89-555

Supreme Court, U.S.
FILED
SEP 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

*

IN THE
SUPREME COURT OF
THE UNITED STATES
October Term, 1989

*

BENTON MUSSLEWHITE,
Petitioner

VS.

THE STATE BAR OF TEXAS,
Respondent

*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

*

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

* * *

Volume II

Benton Musslewhite
PRO SE
1535 Mellie Esperson Bldg.
815 Walker
Houston, Texas 77002
713/222-2288

283 pp

APPENDICES TO PETITION
FOR WRIT OF CERTIORARI

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APPENDIX J

CAUSE NO. 86-44452

THE STATE BAR OF TEXAS	IN THE DISTRICT COURT
VS.	HARRIS COUNTY, TEXAS
BENTON MUSSLEWHITE	270TH JUDICIAL DISTRICT

DISCIPLINARY PETITION

Petitioner, the Grievance Committee for State Bar District Number 4-C, State Bar of Texas, complains of Respondent, Benton Musslewhite, showing the Court:

I.

Petitioner brings this disciplinary action pursuant to the State Bar Act, Tex. Rev. Civ. Stat. Ann. art. 320a-1 (1979) and the State Bar Rules. Respondent is an attorney licensed to practice law in Texas and a member of the State Bar of Texas. Respondent is

a resident of Harris County, Texas. An officer may serve citation on Respondent at 1815 Walker, Suite 1535 Esperson Building, Houston, Texas 77002.

II.

Various non-lawyers, including, but not limited to, Robert Loving, James C. McNeilley, Joe Coddington, Lloyd Donner, Terry Clark, Rita Laird, and Gary Thomas, have at Respondent's request, recommended employment of Respondent or John M. O'Quinn to various potential clients who had not sought their or Respondent's or John M. O' Quinn's advice regarding employment of an attorney. Some of such recommendations resulted in Respondent's or John M. O'Quinn's employment and some did not. In instances where employment resulted, Respondent or John M. O'Quinn paid some

of these non-lawyers sums of money for recommending and securing such employments. Respondent also promised to pay and/or paid some of these non-lawyers a share of Respondent's fee in the cases. O'Quinn's actions were with Respondent's knowledge and/or at his behest. Such conduct violates Disciplinary Rules 1-102(A) (1) (2) (3) (6), 2-103(A) (C), and 3-102(A), and constitutes professional misconduct under State Bar Rules art. X, 7(1)(5).

III.

Respondent and John M. O'Quinn entered into an agreement by which O'Quinn was to finance Respondent's law practice for and in consideration of the assignment to O'Quinn of a portion of Respondent's attorney's fees to be earned in various cases in the future. O'Quinn made advances to Respondent on a case by case basis. O'Quinn would

thereafter be repaid by Respondent with a share of the fees in the cases. O'Quinn would perform no legal services on behalf of the clients in order to share in the fee, and assumed no responsibility for the representation of the clients. The clients had no knowledge of the fee division and did not consent to same. Such conduct violates Disciplinary Rules 1-102(A)(I)(6) and 2-107(A), and constitutes professional misconduct under State Bar Rules art. X, 7(1).

Petitioner prays for judgment that Respondent be disbarred, suspended, and reprimanded as the facts shall warrant and that petitioner have such other

relief to which entitled, including costs of court and attorney's fees.

Respectfully submitted,

ALEXANDER & MCEVILY
By: Tom Alexander
Tom Alexander
TBA 1000000
Five Post Oak Park
Ste 2400
Houston, Texas 77027
713/439-0000
ATTORNEYS FOR PETITIONER

OFFICE OF THE GENERAL COUNSEL
STATE BAR OF TEXAS
By: Steven M. Smoot
Steven M. Smoot
First Assistant Gen. Counsel
State Bar No. 18774300
Post Office Box 12487
Austin, Texas 78711
512/463-1381

APPENDIX K

CAUSE NO. 87-09377

THE STATE BAR OF TEXAS	[ ]	IN THE DISTRICT COURT
V.	[ ]	HARRIS COUNTY, TEXAS
JOHN M. O'QUINN	[ ]	189TH JUDICIAL DISTRICT

FIRST AMENDED DISCIPLINARY PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Petitioner, the Grievance Committee for state Bar District Number 4-E, State Bar of Texas, complains of Respondent, John M. O'Quinn, showing the court:

I.

Petitioner brings this disciplinary action pursuant to the State Bar Act, Tex. Rev. Civ. Stat. Ann. art. 320a-1 (1979) and the State Bar Rules. Respondent is an attorney licensed to practice law in Texas and a member of

the State Bar of Texas. Respondent is a resident of Harris County, Texas. Respondent has appeared herein.

II.

A. Various non-lawyers, including, but not limited to, Robert Loving, James C. McNeilley, Joe Coddington (individually and under the auspices of D.L.C., Inc.), Sonny Long, Kirby McDowell, Rocky McDowell, Lloyd Dohner and Terry Clark (individually and under the auspices of American Overseas Investigators), Jerry White, James Grafton and Thomas Branch (individually and under the auspices of Plains Overseas Group, Inc.), Gary Thomas, and Rita Laird, have at Respondent's behest recommended employment of Respondent to various potential clients who had not sought their or Respondent's advice regarding employment of an attorney. Such

conduct violates Disciplinary Rules 1-102(A)(1)(2)(3)(6) and 2-103(A), and constitutes professional misconduct under State Bar Rules art. X, 7(1)(5).

B. Some of such solicitations resulted in Respondent's employment and some did not. In instances where employment resulted, Respondent paid some of these non-lawyers, or their front organizations, sums of money for recommending and securing such employments. Such conduct violates Disciplinary Rules 1-102(A)(1)(6) and 2-103(C), and constitutes professional misconduct under State Bar Rules art. X, 7(1).

III.

On December 12, 1985, several persons died in the crash of the Air Arrow Flight in Gander, Newfoundland. Robert Loving, a non-lawyer, thereafter at Respondent's behest contacted the

Roberts family in Mississippi and recommended the professional employment of Respondent to represent the family on claims arising out of the death of Mr. Roberts in the crash. The Roberts family did not seek Loving's or Respondent's advice regarding employment of an attorney. The Roberts family did so employ Respondent. Respondent then paid Loving a sum of money for recommending and securing the employment by the Roberts family. Such conduct violates Disciplinary Rules 1-102(A)(1)(2)(3)(6) and 2-103(A)(C), and constitutes professional misconduct under State Bar Rules art. X, 7(1)(5).

IV.

Respondent and Benton Musslewhite, an attorney, entered into an agreement by which Respondent was to finance Musslewhite's law practice for and in

consideration of the assignment to Respondent of a portion of Musslewhite's attorney's fees to be earned in various cases in the future. Respondent made advances to Musslewhite and Respondent would thereafter be repaid by Musslewhite with a share of the fees in the cases. Respondent would perform no legal services on behalf of the clients in order to share in the fee, and assumed no responsibility for the representation of the clients. The clients had no knowledge of the fee division and did not consent to same. Such conduct violates Disciplinary Rules 1-102(A)(1)(6) and 2-107(A), and constitutes professional misconduct under State Bar Rules art. X, 7(1).

V.

On or about May 2, 1986, the State Bar of Texas sent to Respondent a

letter requesting Respondent to furnish a written response to various allegations of professional misconduct. Respondent failed to furnish the requested information or to assert grounds for failure to do so. Such conduct constitutes professional misconduct under State Bar Rules art. X, 7(4).

Petitioner prays for judgment that Respondent be disbarred, suspended, or reprimanded as the facts shall warrant and that Petitioner have such other relief to which entitled, including costs of court and attorney's fees.

Respectfully submitted,

Office of the General Counsel
STATE BAR OF TEXAS
P. O. Box 12487
Austin, Texas 78711
512/463-1381

By: /s/ Steven M. Smoot
Steven M. Smoot
First Assistant General Counsel
State Bar Card No. 18774300
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing First Amended Disciplinary Petition has been served on Respondent's attorneys of record, David Berg, 3702 Travis Street, Houston, Texas 77002, Richard Haynes, P.O. Box 701068, 4300 Scotland, Houston, Texas 77270-1068; T. G. Treece, 1303 San Jacinto, Houston, Texas 77002, Luther H. Soules III, 800 Milam Building, San Antonio, Texas 78205; Stanley Binion, 3300 Allied Bank Plaza, Houston, Texas 77002; James R. Leahy, 3300 Allied Bank Plaza, Houston, Texas 77002; William V. Dorsaneo III, 3315 Daniel, Dallas, Texas 75275, by delivery of a true copy to each of them by certified mail, return receipt requested, by depositing same, enclosed in a postpaid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service on the 11th day of December, 1987.

/s/ Steven M. Smoot
Steven M. Smoot

APPENDIX L

(Excerpts from)
COMPLAINTS AGAINST ATTORNEYS
AND GRIEVANCE PROCEDURES

The State Bar of Texas
P. O. Box 12437
Austin, Texas 78711

GENERAL CONSIDERATIONS

When they enter the practice of law, all lawyers take an oath to uphold the law and to abide by the Code of Professional Responsibility promulgated by the Supreme Court of Texas. Those who violate the standards of professional conduct are subject to professional discipline. In serious matters such discipline could mean the suspension of the privilege of practicing law or exercise permanent loss.

. . .

A lawyer may lose the trust of a client for various reasons. In many cases in which a client becomes

dissatisfied, however, grounds for discipline do not exist. A lawyer may be disciplined only if the provisions of the Code of Professional Responsibility have been violated.

An honest disagreement about how a case should be handled - or should have been handled - does not constitute misconduct. Neither does a mistake. Lawyers are human.

Sometimes they make mistakes just like everyone else. If the mistake causes a loss that client may be able to recover the loss from the lawyer through civil remedies. A mistake or error in judgment, however, is not misconduct.

Finally, there are situations which a client may find most annoying but which do not constitute misconduct. An example would be the lawyer's failure to fully explain what is going to happen to the client's case the

lawyer's failure to respond to the client's telephone calls.

While such situations usually do not constitute misconduct, the State Bar is anxious to see them corrected and will generally suggest to the lawyer the steps which need to be taken to resolve them to prevent their recurrence.

. . .

PROCEEDINGS CONFIDENTIAL

Disciplinary proceedings are confidential until they reach the point at which the district grievance committee takes some public action. The reasons for this are to protect any confidential communications between the attorney and his or her client to allow the committee to conduct its investigation in a fair and objective fashion and to prevent any unfair publicity about the attorney or the complainant if the complaint is found to lack substance.

Complaints Against Attorneys and Grievance Procedures

GENERAL CONSIDERATIONS

When they enter the practice of law, all lawyers take an oath to uphold the law and to abide by the Code of Professional Responsibility promulgated by the Supreme Court of Texas. Those who violate the standards of professional conduct are subject to professional discipline. In serious matters such discipline could mean the suspension of the privilege of practicing law or even its permanent loss.

A lawyer may lose the trust and confidence of a client for various reasons. In many cases in which a client becomes dissatisfied, however, grounds for discipline do not exist. A lawyer may be disciplined only if the provisions of the Code of Professional Responsibility have been violated.

An honest disagreement about how a case should be handled — or should have been handled — does not constitute misconduct. Neither does a mistake. Lawyers are human. Sometimes they make mistakes just like everyone else. If the mistake causes a loss the client may be able to recover the loss from the lawyer through civil remedies. A mistake or error in judgment, however, is not misconduct.

Finally, there are situations which a client may find most annoying but which do not constitute misconduct. An example would be the lawyer's failure to fully explain what is going to happen to the client's case or the lawyer's failure to respond to the client's telephone calls.

While such situations usually do not constitute misconduct, the State Bar is anxious to see them corrected. And will generally suggest to the lawyer the steps which need to be taken to resolve them and to prevent their reoccurrence.

PROCEEDINGS CONFIDENTIAL

Disciplinary proceedings are confidential until they reach the point at which the district grievance committee takes some public action. The reasons for this are to protect any confidential communications between the attorney and his or her client, to allow the committee to conduct its investigation in a fair and objective fashion, and to prevent any unfair publicity about the attorney or the complainant if the complaint is found to lack substance.

APPENDIX L

(Excerpts from)

COMPLAINTS AGAINST ATTORNEYS AND GRIEVANCE PROCEDURES

GENERAL CONSIDERATIONS

When they enter the practice of law, all lawyers take an oath to uphold the law and to abide by the Code of Professional Responsibility promulgated by the Supreme Court of Texas. Those who violate the standards of professional conduct are subject to professional discipline. In serious matters such discipline could mean the suspension of the privilege of practicing law or even its permanent loss. . . . .

A lawyer may lose the trust of a client for various reasons. In many cases in which a client becomes dissatisfied, however, grounds for discipline do not exist. A lawyer may be disciplined only if the provisions

APPENDIX M-1

Law Office of Benton Musslewhite, Inc.
Counselors of Law
609 Fannin
Houston, TX 77002
713/222-2288

March 26, 1986

Ms. Jacalyn Scott, Chairperson
GRIEVANCE COMMITTEE
DISTRICT NO. 4A
STATE BAR OF TEXAS
1121 Walker, Suite 700
Houston, Texas 77002

RE: File No. 453-385; Barham - Musslewhite Judgment by Grievance Committee 4A

Dear Ms. Scott:

This is to advise you that I do not agree to the Public Reprimand. I made no misrepresentation to anyone, did not solicit the case, and violated no Canons of Ethics. I am referring this matter to my attorney, Mr. Wayne Paris.

Sincerely,
/s/ Benton Musslewhite
Benton Musslewhite

BM/dm

APPENDIX M-2

(Excerpts from offer of repremand)

OFFER OF GRIEVANCE COMMITTEE
BEFORE THE GRIEVANCE COMMITTEE FOR
STATE BAR DISTRICT NO. 4A
STATE BAR OF TEXAS

APPLICANT AGAINST	[]	
	[]	
BENTON MUSSLEWHITE	[]	FILE NO.453-385
TBA #19540414	[]	
	[]	
HARRIS COUNTY,	[]	
TEXAS	[]	

AGREED JUDGMENT OF PUBLIC REPRIMAND

BE IT RECOMMENDED that a complaint was docketed with the Grievance Committee for State Bar District No. 4A, State Bar of Texas, against Benton Musslewhite, hereinafter referred to as "Complainant", alleging certain acts of professional misconduct on the part of said Respondent.

The Committee conducted a hearing on this complaint, at which Respondent after having been duly notified of the

complaint and after having been duly notice for said hearing, appeared and presented evidence in his own behalf.

.....

By reason of the foregoing findings of fact and conclusions of law, the Committee is of the opinion that the Respondent should be publicly reprimanded and will accept such action as final; it is, therefore, ORDERED that the Respondent is hereby publicly reprimanded, which public reprimand shall be fully entered upon the Respondent agreeing to its entry by signing and having acknowledged the Consent to Judgment appended to this agreed Judgment of Public Reprimand, all in accordance with the provisions of the State Bar Rules governing the State Bar of Texas.

SIGNED this ___ day of _____, 1986.

GRIEVANCE COMMITTEE

DISTRICT NO. 4A
STATE BAR OF TEXAS
By: _____
Jacalyn Scott, Chairperson

CONSENT TO JUDGMENT

In connection with charges of professional misconduct filed against me and heard by your Committee, I hereby consent to entry of the attached Judgment in the form submitted to me pursuant to Article X, Section 14, of the State Bar Rules.

SIGNED this ____ day of _____, 1986.

_____
Benton Musslewhite

APPENDIX N

(Excerpts from)
Law Office of Benton Musslewhite, Inc.
Counselors of Law
609 Fannin
Houston, TX 77002
713/222-2288

July 29, 1986

Disciplinary Review Committee
State Bar of Texas
c/o Franklin Jones, Jr., Chairman
201 W. Houston
Marshall, Texas 75670

Re: Request for removal of complaints against Benton Musslewhite from Grievance Committee of Houston, Texas

Dear Mr. Jones:

It is with a certain degree of reluctance that I write this letter requesting that all grievances filed against me which are now under consideration by Grievance Committee 4-C of Houston, Texas, be removed from that Committee and assigned to another Committee for consideration and handling.

I am aware of the fact that Mr. John O'Quinn, another member of the Bar who is an object of a general investigation by Committee 4-C, previously filed a similar motion with this same Committee, which I understand was granted. While I would not be so presumptuous as to assert that the action by this Committee with regard to the O'Quinn motion would automatically require the granting of a similar motion filed by me, I do want to point out that many of the grounds asserted by Mr. O'Quinn could be asserted with equal force by me. For example, his contentions with respect to Ms. Gloria Chaplin and Ms. Eva Fontenot, two of the representatives in the class action suit involving the dumpsites in the Eastern part of Harris County, Texas, are more appropriate to me and to the efforts that I have continued to make in that lawsuit than with regard to Mr.

O'Quinn, because Mr. O'Quinn had withdrawn from the lawsuit quite some time ago, while I am continuing to represent these people.

Even so, since I do not take the filing of this kind of a motion lightly, I had resolved not to request a transfer, even after Mr. O'Quinn's action, provided I could receive assurances from Mr. Thomas Johnson, then Assistant General Counsel handling the Committee 4-C investigation, that I would not be prejudiced by the hostility which Mr. O'Quinn's motion had apparently generated. In fact, I had requested a meeting with Mr. Johnson in that regard and was scheduled to meet with him early last week but that meeting was cancelled when Mr. Johnson resigned. Then, the next day there appeared an article in the Houston Chronicle (Wednesday, July 23, 1986) under the byline of Ms.

Bonnie Britt, which I am attaching to this letter and incorporating herein by reference. That article makes it very clear that I now have no choice but to ask that all grievances against me, being handled by Committee 4-C, be transferred to another Committee for consideration and handling.

The article clearly revealed that someone connected with Committee 4-C, probably either Mr. Romeo Garcia, its investigator or Mr. Johnson, its counsel, revealed confidential matters handled by a previous Grievance Committee and by Committee 4-C in such a way that, not only were the matters revealed not true or correct, but were obviously designed to cause me as much personal harm as possible. I mentioned Mr. Garcia because Ms. Britt has taken him to three of my clients, on two separate occasions (Ms. Chaplin, Ms. Fontenot and Mr. Joe Coddington), in

an effort to get them to discuss alleged misconduct by me. The Bonnie Britt article had a devastating and tremendously damaging impact upon me and I certainly would be remiss if I did not ask that the investigation of me be removed to a Committee that is not tainted with such leaks and repeated violations of the State Bar disciplinary and operating rules with respect to the handling of grievances.

. . .

3. The statements Ms. Britt refers to about the 1981 investigation, attributed to me, apparently came from an article in the Texas Lawyer written by another reporter and I want to clear the record at this point and state that I have never told any reporter that Mr. Steven Peterson gave me any form of absolution. I had stated in my overall reply to Committee 4-C, a copy of which is attached hereto and incorporated

herein by reference, that Mr. Peterson had investigated the matter of solicitation following the Rita Laird affidavit, and had given me some advice about the proper sources for cases, and I had assiduously followed that advice. I was then called and asked by the reporter for the Texas Lawyer about the investigation in 1981. I do not know where she got the information about that investigation but it certainly did not come from me. I assume, since it was mentioned in my reply to Grievance Committee 4-C, that someone connected with Committee 4-C "leaked" that information also, either to Ms. Britt or to her. Wherever it came from, my only reply was that such an investigation did take place and that Mr. Peterson had looked into such matters in my office, given me some advice, and that no action was taken thereafter.

. . .

5. While anything Ms. Britt prints is suspect, if she has only partially quoted Mr. Doherty accurately, it now appears that he and perhaps other members of his Committee may have been caused to become even further hostile toward me. It is obvious, if one takes a reasonable overview of the article, that Mr. Doherty's reaction to the action taken by Mr. Peterson manifests the belief that I am the central cause of the entire episode (inasmuch as, according to Ms. Britt, Mr. Johnson apparently called Mr. Peterson to testify about the 1981 investigation involving me) and, therefore, I think any fair-minded judge or impartial Committee can see that the chance for injustice, involving the investigation of me at this point, is such that it would be in the interests of all concerned for the complaints against me

to be removed to another Committee that is not involved in the Johnson-Garcia episode. Words such as "stupid, ill-timed and unfair" (attributed to Mr. Doherty) are just too strong an indication of resentment about the whole matter to be ignored.

. . .

6. The statement by Mr. Doherty that one or more of the lawyers being investigated must have stirred up the press coverage on the investigation (which, thanks to whoever connected with Committee 4-C is working with Ms. Britt and Ms. Britt herself, has now become national in scope, e.g. Newsday, National Law Journal, etc.) is, I must say as respectfully as I can, incredulous. The last thing I would want printed in the local and national press are the extremely damaging remarks about me which could only have come from someone connected with the

Committee 4-C. You can imagine how embarrassing all of this has been to my wife and seven children, including one who is a practicing attorney in Houston. I recall that Ms. Britt was the first reporter to ask me about the investigation and I was astounded that she knew about it. I certainly was not going to lie to her about it nor was I going to say "no comment" because I was afraid she would make more of it than it deserved. My responses were only to questions asked by her (which was indisputably revealing of inside knowledge) and were carefully couched. In sum, it is very obvious that one or more persons officially connected with Committee 4-C set out, in violation of the State Bar confidentiality rules and in collaboration with Ms. Britt, to sensationalize the investigation to the extent that such Committee's further handling of the investigation would not

be in the interest of justice.

. . .

In addition to all the foregoing, Mr. Jones, I want to adopt the matters asserted by Mr. O'Quinn (to the extent they are not adverse to me - I have not seen the request he filed) and the evidence which he presented to the Oversight Committee at the time of the hearing on his request for transfer. Again, I have not been privy to what that evidence consisted of, except to the extent that I know two of my clients were called to testify, but I think it would be in the interest of an economy of justice for me to be able to incorporate such evidence into my motion and request by reference.

. . .

Finally, for all the reasons stated by Mr. O'Quinn in his motion, for all the above and foregoing reasons, and for the reasons made so apparent in the

Bonnie Britt article, it now seems to me to be very clear that it would only be fair and proper for your Committee to exercise its duties and responsibilities by transferring the grievances against myself to another Grievance Committee.

Should you need any further information or should a hearing be necessary, please advise; I will be happy to respond or to appear.

Sincerely,

/s/ Benton Musslewhite
Benton Musslewhite

BM/dm

cc:Steven B. Peterson
State Bar of Texas - General Counsel
State Bar Bldg. 1414 Colorado St.
Austin, Texas 78711

APPENDIX O

Berg & Androphy
A Partnership including a
Professional Organization
Attorneys at Law

David Berg
Board Certified Criminal Law
Texas Board of Legal Specialization
Joel Androphy

May 19, 1986

Mr. Franklin Jones
Chairman, Disciplinary Review Committee
201 W. Houston St.
P. O. Drawer 1249
Marshall, Texas 75670

RE: File No. 207-286; John O'Quinn

Dear Mr. Jones:

On behalf of my client, John O'Quinn, I request this case be transferred to another county or, failing that, to a different committee.

In January, 1985, the District 4 Grievance Committee of the State Bar of Texas initiated an investigation into the law practice of John O'Quinn. In connection with this investigation and others, Romeo Garcia, investigator for

District 4, disclosed confidential information gathered by the State Bar to member(s) of the press, including but not limited to Bonnie Britt of the Houston Chronicle, in violation of State Bar Rules, Title 14, Vernon's Ann. Civ. St., Art. 320(a)-1, Sec. 13(b), Title 14 App., Art. 10, Sec. 34(A) and (E), Art. 1, Sec. 19, Constitution of the State of Texas and the Fifth and Fourteenth Amendments to the Constitution of the United States. Mrs. Britt and Romeo Garcia were both present while he questioned Gloria Chaplin about confidential grievance matters. (See Exhibit "A").

Mrs. Britt has questioned Mr. O'Quinn about matters that were obviously leaked to her by Garcia (Exhibit "B", affidavit of O'Quinn). As a result rumors have swept through the legal community regarding the "finding" of the investigation,

including nonexistent deals made by O'Quinn and even that he had been indicted (Exhibit "B").

O'Quinn's practice has been ruined. Five members of his nine person firm quit as a result of the adverse publicity generated by the Defendants. Clients have begun to call concerned about O'Quinn's ability to continue to represent them. Some have requested their files be returned (Exhibit "B").

O'Quinn's law partner, Fred Hagans, immediately withdrew from the firm upon being informed by committee member(s) of the pending investigation of his firm. Hagans was and is an active member of Committee 4C, although he has been asked to recuse himself from active participation in this case. O'Quinn believes that his partner will necessarily be a witness before the committee on which he serves. Being investigated by a committee on which a

witness serves denies O'Quinn fair play and due process under the State and Federal Constitutions.

Mr. O'Quinn must respond to the written notification of Committee 4C by May 25, 1986. We are asking for immediate consideration of this problem or, in the alternative, for a stay of all proceedings until such time as the Disciplinary Review Committee has the opportunity to decide.

Very truly yours,

/s/ David H. Berg
David H. Berg

DHB/pw

APPENDIX O-1

AFFIDAVIT OF GLORIA CHAPLIN

THE STATE OF TEXAS

COUNTY OF HARRIS

I, GLORIA CHAPLIN, give this affidavit and swear that the facts stated herein are true and correct.

On April 30, 1986, I went downtown to see my attorney, Mr. Benton Musslewhite. As I was entering his office building that morning, Mrs. Bonnie Britt met me in the lobby and asked me to have lunch with her. I was to meet her at her office in the Houston Chronicle. I know Mrs. Britt well. She is a Houston Chronicle reporter whom I have met and talked to before in the course of her writing various articles about a hazardous chemical dumpsite near my home. After I saw Mr. Musslewhite, I went to Mrs. Britt's office to have lunch with her

and was given a message that she had already gone to lunch and that I was to join her. I then went to meet her at a salad bar in an office building at the intersection of Texas and Main Street. Mrs. Britt was with a man whom I later learned was Mr. Romeo Garcia. They had already eaten lunch together before I arrived. Mrs. Britt introduced me to Mr. Garcia and said that he wanted to talk to me. I then ate lunch with them as they drank tea. Mr. Garcia told me he was with the State Bar and wanted to talk to me about the investigation of Joe Coddington, Benton Musslewhite and several other attorneys named John O'Quinn, Charles Parker, Mike Perrin, Bill Edwards and Joe Jamail.

Further the affiant sayeth not.

/s/ Gloria Chaplin
Gloria Chaplin

SUBSCRIBED and SWORN TO before me on this 14th day of May, 1986.

/s/ Pat Wyatt

Notary Public in
and for The State
of Texas

My Commission Expires:
3-31-88

APPENDIX O-2

THE STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared JOHN O'QUINN who, after being by me first duly sworn, did upon his oath state as follows:

In January, 1986, my law firm, then called O'Quinn and Hagans, had nine (9) attorneys. We limited our practice to civil trial work, primarily plaintiffs' personal injury cases. We had an outstanding group of attorneys and reputation. Not long thereafter rumors began that I was being investigated by the State Bar Grievance Committee for alleged solicitation of cases. My former partner, Fred Hagans is a member of State Bar Grievance Committee 4C. That is the committee investigating my case. Hagans was told about the

investigation in sufficient detail to cause him to believe I would be disbarred and that caused him to withdraw immediately thereafter from our firm. Although Mr. Hagans has been recused from my case, he still is an active member of the committee, who regularly meets with the committee to hear other matters.

Since then rumors have continued and escalated, including that I have been indicted; that my practice was being taken over by Fred Hagans; that I was offered a six (6) month suspension but it was refused; and that I was settling all my cases in anticipation of discipline. The rumors are destroying my practice. In addition to Mr. Hagans' immediately withdrawing from the firm, another four (4) attorneys have since left. Thus, of the original time (9), only three (3) attorneys beside myself remain.

I have reason to believe that Romeo Garcia, local investigator for District 4, is on a fishing expedition, researching courthouse records to find out who my clients are in order to talk to them to see if they will say anything negative about me.

Billy Davenport, a client, called to find out why Romeo Garcia, an investigator from the State Bar was bothering him. This caused him concern about whether something was going on to affect his case. Other clients are asking for their files back. One client named Jill Crook called me to ask if it was true that I was going to be disbarred. Her "best" friend had called her to tell her that she had better get a new attorney because I was going to be disbarred. The friend told Mrs. Crook that she had heard this rumor from an attorney. Mrs. Crook's friend further related that the

attorney (whose name I can supply) was saying that he would be happy to work on the case and could even do a better job since I was in trouble with the Bar. I recently settled a nursing home case in which I represented one Mrs. Hazel McKinnon and others. There was a newspaper article about the case and my associate tells me a member of her family has been contacted to find out how we got it. They don't have to look far. It was referred to me by Larry Doherty, Chairman of Grievance Committee 4C.

I wish to emphasize that not one client has filed a complaint against me. Under these circumstances it seems most improper for a State Bar investigator to be calling my clients at random to see what they might say. Such conduct destroys the attorney-client relationship.

I have also reason to believe that

the investigator, Romeo Garcia, is sharing information with a newspaper reporter named Bonnie Britt of the Houston Chronicle. (See attached affidavits. Mrs. Britt came to interview me about matters she had heard about me related to this investigation. I asked her to tell me what story she had heard. She acknowledged having met with and talked to Romeo Garcia. She then asked about specific clients and the very matters that are under investigation, per notice letter sent to me by the Grievance Committee.

/s/ John O'Quinn
John O'Quinn

SWORN TO and SUBSCRIBED TO before me on this___ day of _____, 1986.

/s/
Notary Public in and for
The State of Texas

My Commission Expires:

_____

APPENDIX P-1

IN THE 270TH JUDICIAL DISTRICT
COURT OF HARRIS COUNTY, TEXAS

IN THE STATE BAR OF TEXAS	[]	CAUSE NUMBER 86-44,452
BENTON MUSSLEWHITE	[]	

RULE 257 MOTION
FOR CHANGE OF VENUE

TO THE HONORABLE SOLOMON CASSEB, JR., PRESIDING JUDGE

Pursuant to Rule 257, Texas Rules of Civil Procedure, BENTON MUSSLEWHITE, Respondent, respectfully moves the Court for a change of venue. In support of this motion Respondent would show the following:

I.

Because of the extensive prejudicial pre-trial publicity which has been focused on this case and a related case styled THE STATE BAR OF TEXAS V. JOHN O'QUINN, CAUSE NUMBER 87-009377, an impartial trial cannot be had in

Harris County, Texas.

II.

In support of this motion Respondent has attached hereto his own Affidavit and the affidavits of three credible persons, each of whom is a resident of Harris County, Texas.

WHEREFORE, Respondent prays this motion be granted and that the venue of this cause be transferred to a district where an impartial trial can be had.

Respectfully submitted,

/s/ Ray Bass
Ray Bass
P. O. Box 237
Austin, Texas 78767
(512) 478-2277
ATTORNEY FOR RESPONDENT
TBC #01884000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion For Change of Venue and copies of the attached affidavits were personally

delivered to Steven Smoot, Assistant General Counsel, State Bar of Texas, on November 9, 1987.

/s/ Ray Bass

Ray Bass

APPENDIX P-2

IN THE 270TH JUDICIAL DISTRICT
COURT OF HARRIS COUNTY, TEXAS

IN THE STATE BAR	[]	
OF TEXAS	[]	CAUSE NUMBER
	[]	86-44,452
BENTON MUSSLEWHITE	[]	

MOTION FOR INDIVIDUAL VOIR DIRE EXAMINATION ON QUESTION OF PRE TRIAL PUBLICITY

TO THE HONORABLE SOLOMON CASSEB, JR., PRESIDING JUDGE OF SAID COURT:

BENTON MUSSLEWHITE, Respondent, respectfully moves the court to permit counsel to question members of the jury panel individually, outside the presence and hearing of others members of the panel, on the question of pre-trial publicity related to this case. In support of this motion Respondent would show the following:

I.

This case and a related case styled THE STATE BAR OF TEXAS V. JOHN O'QUINN

have been the focus of extensive prejudicial pre-trial publicity. In order to determine the existence of any challenges for cause to individual members of the jury panel, and to intelligently exercise his peremptory challenges, Respondent must question members of the jury panel about their exposure, if any, to such publicity.

II.

To conduct the questioning about exposure to pre-trial publicity in the presence of the panel as a group may very well, and in all probability would, result in contamination of those members of the panel who have not been so exposed.

WHEREFORE, Respondent prays this motion be granted and that the court permit counsel to question each member of the jury panel individually, outside the presence and hearing of other

permit counsel to question each member of the jury panel individually, outside the presence and hearing of other members of the panel, to determine (1) whether or not each member has been exposed to the pre-trial publicity about this case or the above sited related case, (2) what the individual juror has seen or heard in the media about this case, and (3) to what extent such publicity would effect the potential juror's verdict.

Respectfully submitted,

/s/ Ray Bass

Ray Bass
P. O. Box 237
Austin, Texas 78767
(512) 478-2277
ATTORNEY FOR RESPONDENT
TBC #01884000

APPENDIX Q

(Excerpts from)

NO. 86-44452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
	[]	
V.	[]	HARRIS COUNTY, TEXAS
	[]	
BENTON MUSSLEWHITE	[]	270TH JUDICIAL DISTRICT

NO. 87-24402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
	[]	
V.	[]	HARRIS COUNTY, TEXAS
	[]	
BENTON MUSSLEWHITE	[]	151ST JUDICIAL DISTRICT

JUDGMENT

On November 10, 1987, the Court called the above styled, numbered, and consolidated disciplinary actions to trial. Petitioners, the Grievance Committees for State Bar District Nos. 4A and 4C, State Bar of Texas, appeared by counsel and by the District 4C Grievance Committee Chairman, and

Respondent, Benton Musslewhite, appeared in person and by counsel. Petitioners announced that they withdrew the Fifth Amended Disciplinary Petition and would proceed on the Fourth Amended Disciplinary Petition. The parties announced to the Court that they agreed to withdraw these disciplinary actions from consideration by the Court, that they waived trial by jury, and that the Court should enter judgment as follows:

. . .

The Court determines that the appropriate sanctions is suspension from the practice of law for a period of ninety (90) days, plus suspension from the practice of law for a period of three (3) years, with suspension of imposition of the three (3) year suspension only and the placement of Respondent on probation for three (3) years.

. . .

IT IS THEREFORE ORDERED that Respondent be suspended from the practice of law for period of ninety (90) days, beginning on November 1, 1988, and ending on January 30, 1989.

IT IS FURTHER ORDERED that the Court may upon written request of Respondent showing good cause and with there commendation of the Custodian, hereafter enter an order delaying commencement of the ninety (90) day suspension until no later than August 1, 1989.

IT IS ALSO ORDERED that Respondent be suspended from the practice of law for a period of three (3) years.

IT IS FURTHER ORDERED that imposition of the three (3) year suspension shall be suspended and Respondent shall be placed on probation for a period of three (3) years commencing on February 1, 1988

and ending on February 1, 1991, under the following terms and conditions during the term of probation:

1. Respondent shall not commit misconduct as defined by the State Bar Rules art. X 'Sec. 7;

2. Respondent shall accept no new employment by clients until November 1, 1988, although Respondent may refer potential clients to other attorneys;

3. Respondent shall furnish on or before March 1, 1988 to the Court, counsel for Petitioners, and Hartley Hampton, a full and complete list of all of his clients, along with their addresses and telephone numbers, as well as a full and complete list of all lawsuits in which Respondent is an attorney of record, including cause and court numbers and a brief description of the status of each lawsuit;

4. Respondent shall furnish all open client files as requested by

Hartley Hampton by March 1, 1988;

5. Respondent shall fully cooperate with Hartley Hampton in the performance of his duties hereinafter set forth; and

6. Respondent shall fully cooperate with the State Bar of Texas in furnishing all information, knowledge, and documents concerning other attorneys committing professional misconduct.

IT IS FURTHER ORDERED that should Respondent violate any of the foregoing terms or conditions of probation; the Court may revoke such probation and impose a suspension from the practice of law for a period not to exceed three (3) years, aside and separate from the suspension already herein ordered, under the following procedures:

1. Either Petitioners, or the Office of General Counsel of the State Bar of Texas, shall file a written

motion to revoke with the Court briefly describing the acts and conduct that gave rise to the claimed violation of probation;

2. A copy of such motion shall be served on Respondent pursuant to T.R.C.P. 21a at Respondent's last address shown on the membership rolls of the State Bar of Texas;

3. The Court shall conduct an evidentiary hearing on such motion within forty five (45) days of the date that Respondent is served with a copy of such motion, at which time the State Bar of Texas shall bear the burden of proving its allegations to the Court under the Texas Rules of Evidence by a preponderance of the evidence;

4. After the date that Respondent is served with a copy of such motion and prior to the hearing, either party may invoke the discovery provisions of the Texas Rules of Civil Procedure;

5. The Court shall decide without the aid of a jury whether Respondent violated any of the terms or conditions of probation; and

6. Should the Court decide that Respondent has committed any violation, the Court may enter an order revoking the probation and imposing suspension from the practice of law, for a period of three (3) years, commencing on or after the date of revocation, and aside and separate from the suspension already herein ordered, and/or the Court may also impose additional terms of conditions of probation, or lengthen the period of probation; and

7. Respondent shall have the right to appeal any order of the Court finding that Respondent violated any terms or conditions of probation, and revoking probation or changing the terms, conditions, or period of

probation, as if the order were any other final judgment, pursuant to the Texas Rules of Appellate Procedure.

IT IS ALSO ORDERED that the Court shall, employ the provision of the State Bar Rules art. X Sec. 33 and appoint Hartley Hampton pursuant thereto.

IT IS FURTHER ORDERED that Hartley Hampton shall do the following:

1. Examine the client matters and files, and obtain information as to an pending matters which may be necessary to comply with his duties under State Bar Rules art. X, Sec. 33;

2. Notify Respondent's clients of the ninety (90) day suspension thirty (30) days prior to the commencement of the ninety (90) day suspension, inform them that they may seek other counsel or remain with Respondent, secure written statements from clients who wish to change attorneys, and arrange

for the surrender or delivery of the papers or property of a client who decides to obtain other counsel.

. . . .

IT IS FURTHER ORDERED that if the Court finds upon written application of Hartley Hampton, and after notice and hearing,that Respondent obtained legal employment in violation of a Disciplinary Rule, the Court shall order that Respondent shall forfeit any legal fees he may ever be entitled to arising from the employment, provided that Respondent shall have the right to appeal any order forfeiting legal fees as if the order were any other final judgment, pursuant to the Texas Rules of Appellate Procedure.

IT IS FURTHER ORDERED that Hartley Hampton shall be compensated at a reasonable rate to be established by the Court and to be paid out of attorney's fees accruing to Respondent.

IT IS FURTHER ORDERED that Respondent and Hartley Hampton shall be subject to further order of the Court relating to Respondent's law practice, after notice and hearing.

IT IS FURTHER ORDERED that all costs of Court shall be borne by the party who incurred same and that Petitioners shall recover no attorney's fees from Respondent.

SIGNED: January 24, 1988.
/S/Solomon Casseb
Solomon Casseb
Presiding Judge

APPROVED AND AGREED TO:
OFFICE OF GENERAL COUNSEL
STATE BAR OF TEXAS
/S/ Steven M. Smoot
STEVEN M. SMOOT
First Assistant General Counsel
State Bar No. 18774300
P. O. Box 12487
Austin, Texas 78711
512/463 1381
ATTORNEYS FOR PETITIONER

/S/ Benton Musslewhite
Benton Musslewhite
State Bar No. 01884000
605 Fannin Street, Suite 517
Houston, Texas 77002
Respondent

/s/ Ray Bass

Ray Bass
State Bar No. 01884000
Austin, Texas 78767
713/222 2288
A* 512/478 2277

APPENDIX R

AFFIDAVIT FILED
IN STATE COURT OF APPEALS

THE STATE OF TEXAS [ ]

COUNTY OF HARRIS [ ]

BEFORE ME appeared BENTON MUSSLEWHITE and after first being duly sworn did upon his oath state, swear and affirm as follows, to-wit:

"My name if BENTON MUSSLEWHITE I represent myself Pro Se. I am the Appellant in the above entitled and numbered cause. I make this statement with personal knowledge, of my own free will and accord, and do hereby state, swear and affirm that all the matters and facts set forth herein are true and correct. First, I do hereby swear that all the statements of facts, both direct and inferred, which are contained in the Supplemental Brief to which this affidavit is attached are true and correct. All statements concerning selective prosecution, selective enforcement, discrimination, violation of Equal Protection of the Law, violation of my Due Process rights, all the procedural irregularities mentioned therein, and all the constitutional violations contained in the Supplemental Brief are all also true and correct, including the matters and facts pertaining to the underlying action and the procedural and constitutional irregularities in that action and all the matters pertaining to the revocation action as

well.

"Second, all documents in the Appendices attached to the Supplemental Brief are true and correct; authentic; comply with business records rule; are a part of my business records; I have been the custodian of these records in my office; and I hereby state, swear and affirm that the documents are authentic and admissible as authentic documents under the Rules of Civil Procedure.

"I will now mention a few specific, important matters referred to in this supplemental Brief.

"In the case of Mrs. Barham, her deposition excerpts are true and correct. I want to add (and I was prepared to testify had the trial gone forward) that I advised the people in my office that I did not want to talk to Mr. and Mrs. Barham, primarily because they (at least Mr. Barham) were frequently intoxicated when they called and usually the only purpose of their calls was to demand money of me or else they would file a grievance. At some point in time I got tired of Mrs. Barham badgering the people in my office and told them to tell her that I would not make an advance to her. At one time, I had indicated that I would try to make an advance to Mrs. Barham, but later determined that I was financially unable to do so and so advised her. It was not long after I made that decision and so informed her of it that she filed a grievance. In connection with her case a number of other people were prepared to testify. The defendant who owned the defendant

car in the automobile accident case involving her son was going to testify that Mrs. Barham threatened him with physical harm if he did not settle with her. Mr. Ellis, the lawyer who represented the defendant insurance company was going to testify that the case was settled to the client"s satisfaction; that the case had been diligently prosecuted; that the case was one of no liability to begin with; and that the settlement reached by Appellant on behalf of Mrs. Barham's son was a good settlement under the circumstances. The guardian ad litem was going to testify to the same effect. My Co-Counsel, Mr. Hoyt, whom I asked to take over the case after Mrs Barham filed her grievance, was also going to testify that the case was settled to Mrs. Barham's satisfaction; that the case had been diligently prosecuted; that Mrs. Barham had a very abrasive personality; would call up when she or her husband were intoxicated; and was hard to deal with. He was also going to testify that she failed to show up in Court for proving up the settlement on at least two occasions, causing Judge Shearn Smith to have to threaten to get an attachment out to force her to come to court so that the settlement could be consummated. In addition, the person from my office who first talked to Mrs. Barham, Milton Long, who at that time worked for me as an investigator and legal assistant, was prepared to testify that Mrs. Eunice White, a former client, had called us and indicated that Mrs. Barham wanted to talk to us about us representing her; that in response to her call (Mrs. Eunice White's call), he called Mrs. Barham and she confirmed that she did

want to talk to my office about representing her; that he did not try to persuade her to fire her other attorney, but that in fact she had indicated that she had already discharged her other attorney; that he verified with the other attorney's office that they did not want to continue representing Mrs. Barham; and that it was only after that, that Mrs. Barham came to my office and finally met me, at which time she signed a Power of Attorney. The lawyer that she fired, prior to hiring me, Mr. Milutin, was prepared to testify also that I did not 'run under him' with regard to the Barham case and that he had absolutely no objection to my representing her. Therefore, when all was said and done, it was clear that the State Bar of Texas could not prove any kind of a disciplinary case against me in the Barham matter. In addition, Wayne Paris former Assistant General Counsel of the State Bar (who use to prosecute disciplinary cases) was prepared to testify that Appellant clearly did not violate any disciplinary rule in Barham, Merritt, Jenkins or Yorktown Travel. The combination of her admissions in her deposition; the testimony of myself, the guardian ad litem, Eugene Hoyt (who was a former District Judge), the owner of the defendant truck, Mr. Ellis the defense lawyer, Milton Long and Wayne Paris, demonstrated that the Barham case was entirely frivolous.

"The same is true of the other cases. Mrs. Merritt, whose excerpts of depositions are attached, admitted that she contacted me after she read about my victory in the Donna Johnson case in the newspaper; that I told her that I

would be difficult to contact during the Spring of 1986 because of the trials that were coming up; that she did not discover her possible cause of action against the defendant doctor until January, 1986 (she first contacted me in February, 1986); that I advised her that because the operation in question had taken place more than two years before she contacted me that the only way that she could win the case with regard to the Statute of Limitations would be through the application of the 'discovery rule'; that when she couldn't reach me by telephone, she requested the return of her file and that it was duly returned to her; that she then had hired another attorney and that such other attorney had timely filed suit on her behalf. Again, based upon my testimony and the admissions of Mrs. Merritt, and the testimony of Wayne Paris, the State Bar had absolutely no case with regard to the Merritt complaint.

"With respect to Mrs. Jenkins' complaint, I was prepared to testify that I told her, and there is a letter that we would offer in evidence confirming this, that I would not represent her unless Rob Taylor of Washington D.C. would agree to take the lead in her case (the malpractice allegedly occurred in Washington D.C.). I called and wrote Mr. Taylor about the case and he declined the case. I advised Mrs. Jenkins by telephone that Mr. Taylor was not taking the case and, therefore, I would not be involved. She said she tried to call me several times after that and that may be true, but I had made it clearthat I would not be involved if Mr. Taylor would not be involved and she knew that Mr.

Taylor had declined the case. Mr. Taylor was going to testify in my case and confirm all this. Again, there was absolutely no basis for any kind of complaint of unprofessional misconduct in the Jenkins case.

"As to the Yorktown matter, just as it is stated in the Supplemental Brief, Settle, the owner of Yorktown, was upset with me because I had been unable to pay a travel bill owed to his agency. He did consult an attorney about the bill and his attorney sued me. The bill was incurred in connection with two cases, one in Greece and one in Spain, whereby I had to go to those countries to take depositions. Mr. O'Quinn was supposed to pay the bill but there had been some discrepancy with regard to his books as to whether or not the bill might have been paid in other advances made to me. Eventually I resolved the matter with Mr. O'Quinn and paid Mr. Settle's bill in full. In the meantime, I had called him, not as an attorney, but simply as the Debtor, to see if we could work out a payment schedule whereby I could pay off the debt over a period of time, by the month. I did not discuss the merits of the case nor did I attempt to discuss the merits of the case and I had admitted in both the lawsuit and to Mr. Settle that there was no question that I owed the debt. There is absolutely no question but that there was no basis for any type of disciplinary action in the matter of the Yorktown travel complaint.

"I also point out that I requested, in the pleadings before Judge Casseb, that I should have been entitled to a hearing before the Grievance Committee

in connection with the Merritt and Yorktown complaints, a hearing which was never given me. Suddenly, all the matters against me were transferred from Grievance Committee 4-A (which is the Grievance Committee that is supposed to hear the Musslewhite complaints) to Grievance Committee 4-C, which had embarked upon a highly publicized vendetta to investigate several lawyers for 'solicitation'. It was never explained to me why my matters were transferred from Committee 4-A to Committee 4-C. I asked Steve Smoot that question on a couple of occasions but I never received a satisfactory answer. It was obvious that the reason that they were transferred to Committee 4-C was because Committee 4-C was on the war path, looking for 'scalps' and decided that I was to be one of the victims. In any event, even though I requested a hearing in the Merritt and Yorktown matters, I was never given a hearing ore any Grievance Committee on those matters and thus I was deprived of Due Process in that regard.

"Moreover, I was offered a reprimand in connection with the Barham matter. I turned down the reprimand. It was indicated to me that the four complaints which were made the basis of the first suit filed against me, namely the Barham, Merritt, Yorktown and Jenkins matters, were considered pretty much in the same category. The basis of the allegations in all four of these cases was 'willful neglect'. Steve Smoot and the General Counsel 's office, the Grievance Committee and the State Bar know that there was never any 'willful' neglect involved in any of

those cases. While I admit that, because of my heavy trial schedule, I had a difficult time of returning all telephone calls immediately after they were received by my office, I did eventually return the calls and I certainly called the clients when anything important was about to take place or needed to take place with regard to their file. Obviously the Yorktown matter was simply a debtor-creditor matter; the other three matters, which involved client-attorney relationships, were all handled in such a way that no harm occurred to any of the clients; I never did really embark upon actual representation with regard to Merritt or Jenkins and both of them knew this and knew it in time to take steps to protect their own interests by hiring other lawyers; and the Barham matter was settled completely to the satisfaction of Mrs. Barham and her son, the guardian ad litem and the District Court. I have reviewed the Texas Bar Journals to determine what kinds of punishments are being imposed in cases similar to those - the Barham, the Merritt, Jenkins and Yorktown cases. I could find no case where a lawyer was prosecuted because he owed a debt to somebody else. I could find no case where a lawyer had been prosecuted because he failed to return telephone calls. I could find no case where a lawyer was prosecuted because he refused to accept employment (such as in Jenkins). I could find no case where a lawyer was prosecuted because the lawyer in the case gave back a file when the client requested it and the return of the file took place long before any Statute of Limitations would run. I found no case where a lawyer was prosecuted for other

than 'intentional' neglect and, in fact, I found no case where a lawyer was prosecuted in situations similar to those in the Barham, Merritt, Jenkins and Yorktown matters.

"Moreover, I was told by Wayne Paris, former Assistant General Counsel of the State Bar, that it is the policy of the State Bar, when a lawyer turns down an offer of a reprimand or any lesser punishment, to systematically file suit against such lawyer, seeking disbarment and/or maximum suspension. Obviously, that is precisely what the State Bar did to me in this case - that is, they utilized a 'upping - the - ante' policy in order to deter lawyers from refusing to settle for whatever the Grievance Committee offers and in order to punish a lawyer for not accepting what the Grievance Committee offers.

"In regard to the allegations in the original proceedings pertaining to 'solicitation and fee splitting', you can tell by the allegations made in the initial complaint that the State Bar had no case. They alleged that there were seven 'runners' who improperly referred cases to me . These allegations simply were not true. Three of the people listed were clients of mine who had referred cases to me as clients and the people they referred to me were people they knew or had some relationship with. One was the President of a Veterans Organization, many members of which I had represented during the Agent Orange litigation and, in appreciation of my work for them, they made referrals to me. Two of the people named were people who had formerly been connected with the

National Maritime Union and had referred me business through the Union and had since formed their own maritime overseas investigative service, whereby they would undertake to develop business for me through other lawyers, overseas unions and other legitimate organizations. They never referred clients directly to me, but only thesuch lawyers or organizations. The last one named in the Petition, James McNeilly, I had never met in my life or ever done business with him. I told Mr. Smoot this on a number of occasions but the State Bar never dropped his name from the Petition. Soon after all the matters against me were transferred to Committee 4-C, a 'trial-in-the-press' vendetta begin. Certain people, such as Romeo Garcia, investigator for Committee 4-C, Mr. Johnson, attorney with the General Counsel's office andmembers of the Committee 4-C, started leaking fabricated or distorted information to Ms. Bonnie Britt of the Houston Chronicle and she in turn wrote highly damaging articles about myself and Mr. O'Quinn. She also saw to it that other national publications, such as 'Newsday', wrote similarly damaging articles. I do not know what her motivation was except that I was told that she was very close to Mr. Garcia and I had heard some rumors, which do not need to be detailed at this juncture, about a working relationship with those who were interested in 'tort reform'. In any event, she was eventually discharged by the Chronicle and now works for a newspaper out of Houston.

"However, during late 1985, and all of 1986 and 1987, this hysterical,

frenzied and emotional attack in the press continued. I have been told that the insurance company and large company interests, who were behind the effort for 'tort reform', had used this tactic in places other than Texas and were now using it in Texas, i.e attacking personally some of the more highly visible members of the Plaintiffs' Bar. This was, I was told, part of their strategy of generating animosity toward plaintiff lawyers generally, to help them with their lobbying effort with the Texas Legislature and other legislatures around the country. I was told that there were some relationships between members of the Grievance Committee (through law firms and their chemical company - insurance company clients) and some of the people supervising the 'tort reform' crusade and that there might have even been some financial contributions from those sources to help pay for the 'special prosecution' of myself, O'Quinn and Schwartz. In any event, the trial-in-the-press was highly damaging to me. Soon the Committee 4-C hired a Special Prosecutor, Tom Alexander, and so far as I know, this was the first time in the history of the Texas Bar Association that such a step was taken. The peculiar thing about the situation was that Mr. Alexander was hired to prosecute only myself, John O'Quinn and Newton Schwartz. It so happened, and I so state, that it was not coincidental that we were the only three lawyers prosecuted and also the only three Texas lawyers on the Agent Orange Plaintiffs Management Committee, which was a committee of nine people from across the United States who were charged with the responsibility of prosecuting the massive Agent Orange

litigation in Brooklyn, New York. Many people have intimated that there was a connection between the vendetta being undertaken by Committee 4-C and the fact that I had been involved in the Agent Orange litigation. Indeed, there have some stories written in the press, engineered by Committee 4-C and Bonnie Britt, which indicated that we were being prosecuted because of Agent Orange. I hereby state that all of the Agent Orange cases came to me through a very legitimate and longstanding organization called 'Citizen Soldier' and their General Counsel, Mr. Tod Ensign, or properly from other attorneys or people who had read about my participation in the Agent Orange litigation "In any event, the vendetta was off to a very vicious start and continued throughout 1986 and 1987. Because of the way in which Committee 4-C and the State Bar was conducting their investigation and their trial of myself in the press, I, as O'Quinn had done before me, filed a Motion with the Disciplinary Review Committee, requesting that they transfer the venue of my case from Committee 4-C to Committee 4-A or another appropriate committee. O'Quinn had filed such a Motion and it had been granted by the DRC. But when I filed my Motion, no action was taken and it was apparently just ignored by the Committee, at least until Committee 4-C filed a disciplinary petition against me. I thereby was deprived of my Due Process right to have my motion to transfer considered and passed upon by the DRC. John O'Quinn was accorded that right but, without explanation, I was not. In any event, Franklin Jones Jr. testified that with regard to my motion for change of venue from one

committee to another, and with regard to Newton Schwartz's motion, he had secured from Mr. Steven Peterson, General Counsel, the agreement that Committee 4-C in Houston would not do anything until those Motions were disposed of by the Disciplinary Review Committee. However, without the Disciplinary Review Committee having acted, thus depriving me of my of Due Process right to have the DRC act in connection with my request, Committee 4-C reneged upon the commitment of Steve Peterson to Mr. Jones and filed suit before the DRC had time to act. This is but one of many, many Due Process violations inflicted upon me.

"As the record in this case indicates, the suit involving the 'neglect' or 'telephone call' complaints (Barham, Merritt, Jenkins and Yorktown) was filed first and the suit involving 'solicitation and fee splitting' was filed later and the two suits were consolidated by agreement between myself and the State Bar. I wanted to avoid the expense, which I could not afford, of more than one trial. We also agreed that the trial on all counts would be set for November 7, 1987. And then I later found out that O'Quinn, through David Berg, his attorney, had negotiated a settlement with the State Bar whereby he would accept a public reprimand and testify against me and Schwartz. The matter was kept secret until it finally came out in connection with some of O'Quinn's motions. Tom Alexander, when he became Special Prosecutor, objected to the settlement with O'Quinn and thus got it stopped for the time being. Then O'Quinn launched an attack upon Tom Alexander and through

various motions and efforts made in the State Court of Appeals was able to get the prosecution of himself stayed pending the resolution of whether or not Tom Alexander had authority, under the law, to be a Special Prosecutor in a disciplinary case. Moreover, many members of the State Bar Executive Committee began to complain about the tactics of Committee 4-C, Alexander and the General Counsel's office, particularly because of the manner in which they were engaging in 'trial-in-the-press' tactics and what they called the 'vigilante' tactics of a 'run-a-way' prosecutor. In any event, because of the pressure and criticism, Mr. Alexander was eventually forced to resign in October of 1987, just about two weeks before my trial was scheduled. Up until that time, things were in limbo because of the uncertainly of the status of Alexander and it had been impossible to engage in any further discovery until that matter was straightened out. For example, I had wanted to take the depositions of all so-called alleged 'runners' and the depositions of Mrs. Jenkins and Mr. Settle of Yorktown, but because of Mr Alexander's uncertain situation, such discovery was not possible. When Mr. Alexander resigned, I felt certain that the State Bar would want to agree to postpone the trial until we could all complete our discovery, but then I found out that they wanted to go ahead and force me to trial. And Judge Casseb indicated that he was going to make me go to trial on November 7th as scheduled. Because of the Alexander matter, we filed a Motion For Continuance asking for the case to be postponed so that we

could complete our discovery and be prepared for trial. Judge Casseb, of course, as he did with all Motions which we filed, summarily denied the motion. Then the State Bar announced that it was not going to be ready in the 'solicitation' case and asked the Court to re-sever the 'neglect' cases off from the 'solicitation' case; grant the State Bar a continuance as to the 'solicitation' cases; and put me to trial in the 'neglect' cases. I vehemently opposed this effort because, now that Judge Casseb had denied my Motion for Continuance, I wanted to have the whole case tried and get it over with. Granting the State Bar's Motion to Continue the Solicitation case was not only hypocritical (denying mine and granting their's) but it had the effect of letting the State Bar off the hook with regard to a case they would never be ready to try and it forced me to the expense of defending myself in two trials rather than one, an expense I could not afford. Judge Casseb, though denying the relief I wanted, of course granted the relief that the State Bar wanted and allowed the reseverance, continuance to the State Bar on the solicitation cases and forced me to go ahead and go to trial on the neglect cases.

Most important, facing a jury trial, I filed a Motion To Transfer Venue because of all the adverse publicity. In this connection I verify that all the articles attached as Appendix E, in the Appendices, and all the other Appendices to the Supplemental Brief for that matter, are authentic copies of articles that were in the press on the dates indicated and the newspapers indicated and all other documents are

official documents, are part of my business records, and are authentic within the sense of the Business Records Rules of evidence. There is no question that Judge Casseb, since the trial I was facing was going to be a jury trial, should have changed the venue. At the very least he should have granted our Motion to allow us to question each of the members of the Jury Panel separately on the question of publicity.. To force us to question each member of the Panel in front of other members of the Panel on that issue was unconscionable. But, that he did - that is he denied our Motion for Change of Venue and denied our Motion to allow us to question each of the Jurors separately on the question of publicity. I testified at the about the financial problems I was having at that time, which has been caused by my participation in the Agent Orange case. Since that case was tentatively settled following three years of devoting almost all of my time to that case in New York and it had become obvious that Judge Weinstein was going to drastically cut the fees for all of the members of the Agent Orange Plaintiffs Management Committee, I was in a financial crisis. It had became apparent that I had lost about a million and a half dollars in terms of time and over $200,000.00 in out of pocket expense money. I was therefore forced to file for Bankruptcy in 1985 with regard to myself and at a later time I filed for a Chapter 11 with regard my professional corporation. Moreover, my family had been pressing me to try to put the Barmatter behind me. The Bar had been on my back for over twelve years, and every time I turned around they were after me,

primarily because of my modus operandi to engage in press conferences in connection with highly controversial, high visibility, mass disaster litigation. I recognize that my modus operandi is not popular with the so-called 'establishment' in the plaintiffs' Bar. And it is certainly not popular with the powers-that-be in the large law firms. But it is proper and ethical. What we would do is to accept clients in mass disasters and toxic tort litigation only from lawyers, legitimate organizations or other proper sources. I would, generally several days after the disaster or event had occurred, hold press conferences in connection with them, so that all victims and their personal attorneys would understand their potential rights. This was particularly important in foreign mass disasters where a lot of uncertainty usually existed with regard to American jurisdiction. In those press conferences we would always make it clear that we were taking cases only through the local Solicitors or lawyers or legitimate organizations who represented victims and lived in that vicinity. For example, modus operandi was employed in connection with the Agent Orange, Mexicana aircrash, PCB cases, Liberty Waste Dumpsite cases and Ocean Ranger disasters, as well as eventually the Piper Alpha disaster. In any event, as I was saying, my family was tired of the unremitting fight with the State Bar and wanted me to get it behind me. Moreover, I had a lot of important cases coming up in the Spring of 1988. This included my upcoming argument before the Supreme Court of the United States in the case of Chick Kam Choo

vs. Exxon and a number of other cases that were scheduled to go trial. Therefore, in view of the harsh, unfair and incorrect rulings made by Judge Casseb concerning the Continuance, the Bar's Motion to split the trials up again, My Motion To Transfer Venue, My Motion to Question the Jurors Separately on the question of publicity, and all the other rulings; my financial situation; the personal desires of my family; and, most important of all, my desire to get back to representing my clients and to be able to spend my full time on their cases rather than defending myself against the State Bar, I decided to settle my case with the State Bar.

While I had this strong desire to settle the case for the reasons I have stated, I still would not have settled this case had I known what was really on the General Counsel's mind. There was nothing in the Settlement or the Agreed Judgment, executed to carry out the Settlement, which prevented me from engaging in the modus operandi I had been using all along, namely the use of press conferences with respect to cases which had come solely through attorneys, legitimate organizations or unions. There was nothing in the settlement or the Agreed Judgment which prevented me from traveling to foreign nations or near the scenes of mass disasters. There was nothing in the Settlement or the Agreed Judgment that prevented me from communicating, publicly, with other attorneys or using public communications that were targeted ultimately to other attorneys. There was nothing in the Settlement or Agreed Judgment that, in order to comply with the so-called Referral Clause, I could not accept a Power of

Attorney, and could only refer a case by telling the client about another attorney and that I could not work upon the case after I referred it to another attorney. There was nothing in the Settlement or the Agreed Judgment that indicated that I could not receive a fee for referring cases during the first year of the probation period. I hereby state, swear and affirm that if I thought that any of the foregoing matters were intended by the State Bar to constitute a restriction upon me during the three year probation period, I would not have accepted the probation nor would I have accepted the Agreed Judgment. I would have gone to trial, despite all the reasons I wanted to settle. I hereby state that I relied upon the fact that the Agreed Judgment and the Settlement, and the discussions between myself and Mr. Smoot, did not restrict me in those ways. I later found out, long after the Agreed Judgment was entered into, to my shock and amazement that what the General Counsel really intended was that I was not to hold any press conferences for any purposes. Had I known this, I certainly would not have agreed to a settlement which deprived me of my First Amendment rights in such a way. I was soon to learn what the State Bar really intended by the Agreed Judgment/Settlement - to put me in shear bondage and to strip me of all effective rights to practice law.

"When the Agreed Judgment was to be released and made public (on January 31, 1989) I scheduled a press conference so that I could minimize the damages to my standing in the profession. I wanted to make it clear that I had not admitted to any

specific act of unprofessional misconduct and that I was simply entering into a settlement, as do most civil litigants, to end the litigation and get the expense and the inconvenience of the litigation off my back. The day before the press conference, Steve Nicholas, a lawyer in San Antonio whom I had hired to help me get through the three year probation period, called me and said that Judge Casseb had made it clear to him that he didn't want me have a press conference concerning the Agreed Judgment. I was shocked by this. I didn't know what to do. I went back and re-read the Agreed Judgment and again saw that the Agreed Judgment did not restrict my right to have a press conference nor did it in any way restrict my First Amendment rights. Mr. Nicholas made it clear that if I went ahead and had the press conference, I was going to incur the wrath of Judge Casseb. There are a number of witnesses to all this, but, in any event,I finally decided to placate Judge Casseb by reducing my role in the press conference. I let my attorney, Ray Bass, conduct the press conference. This had the effect of lessening the effectiveness as to why I entered into the Agreed Judgment. This whole episode highly disturbed me.

"Not long thereafter, in connection with the filing of a new suit with regard to the rights of the Vietnam Veterans concerning their exposure to Agent Orange, I held a press conference in Washington, D. C. No sooner than I had participated in that press conference, Mr. Hampton was calling me and telling me that Steve Smoot of the General Counsel's office was all upset because I had held that press

conference. I explained to Mr. Hampton that there was nothing wrong with it; that we were simply announcing the filing of a new suit; that the case in question had been properly referred to Wayne Mansulla; and that I had in no way violated any of the terms of the probation. Little did I know that there was an undisclosed restriction upon me within the intention of the General Counsel's office and Judge Casseb that was not stated in the Agreed Judgment and that was that I was not to have press conferences for any purpose. Then came the press conference that I held in connection with the Piper Alpha matter. I have fully testified about how that came about. There is no need for me to repeat those matters in this particular Affidavit, except to say that I thought I was doing what was proper by having the Piper Alpha press conference, for three reasons:

1. I was making it clear that I was not to be associated with the so-called Bhopal Brigade, namely lawyers who would come into town in connection with a mass disaster and openly and blatantly solicit victims directly. I made it clear that I was not going to solicit any victim nor even discuss a potential case with any victim, but would discuss any potential litigation in Texas only with Solicitors who might have been employed by the victims.

2. I had been advised by a number of Scottish Solicitors with whom I had worked on other cases in the past, that they were concerned

about an effort on the part of a group Aberdeen Solicitors, working with another American law firm (SPEISER & KRAUSE), to forge through a group settlement for about 120,000.00 pounds per family. They wanted me to make it clear to all of the Solicitors who might be representing victims, that such settlement was too low compared to potential American values and to give some indication of what the potential American values might be.

3. A number of the Solicitors were still uncertain about the potential jurisdiction in Texas and in the United States. They had heard a lot about Piper vs. Reyno and its adverse impact upon potential jurisdiction in the United States. They did not quite fully understand the difference between state court forum non conveniens law and federal forum non conveniens law. Therefore, it was their suggestion that I make it clear to the Solicitors who might be handling these cases, by public communication, what the present status of Texas law was with regard to forum non conveniens and the possibility of retaining jurisdiction in the United States.

"For those reasons, I decided to have the press conference. The evidence demonstrating that I objected to the letter to the victims sent by Kelly Newman, asking that they have their Solicitors contact Kelly Newman, and to the ad that was run by Kelly

Newman, is contained in the Statement of Facts and I need not repeat all that evidence now. Suffice it to say, I did not transgress DR2-101 and everything I did and said in Scotland was fully protected by the First Amendment to the Constitution of the United States. The Bar complained about the fact that I did not, at the press conference, volunteer the fact that I was on probation, but the fact remains that at the very moment that that matter became material - that is when some Solicitor approached me about potential employment - I did make the full terms of my probation known to such Solicitor.

"In any event, the press conference in Aberdeen stirred up the most unbelievable, emotional, unprofessional and unreasonable response by the President of the State Bar, the General Counsel, the Assistant General Counsel, Hartley Hampton and all those who might have anything to do with my probation. I need not repeat all those statements in the press, or other actions, except to state that the articles from the press attached as appendices to the Supplemental Brief, as I have stated above, are accurate and authentic copies and they all demonstrate quite clearly that the State Bar, through Jim Sales, the President of the State Bar, Steve Peterson, the General Counsel, Steve Smoot, the AssistantGeneral Counsel and Hartley Hampton, the appointed Custodian, had obviously reached the foregone conclusion to have my probation revoked and have me suspended for three years. They had pre-judged the situation without knowing the true facts and the

revocation thereafter was just a formality.

"Incidentally, I should say that, in the meantime, Hartley Hampton, who had been appointed by the State Bar to review all of my cases and to advise the Court if any single one of cases had been improperly solicited, had, after nine months of having access to my files and the list of my cases, not reported to Judge Casseb one single case that had been improperly solicited. It could already be seen that the solicitation allegations were nothing but frivolous allegations and this confirmed that fact. This examination by Mr. Hampton included all cases, including those mentioned in all the press clippings about the solicitation investigation, such as Agent Orange, Arrow Air, Bhopal and the Dallas-Fort Worth air crash.

"Also it is my understanding, when I entered into the Agreed Judgment, that Hartley Hampton, the appointed Custodian, was to be a fair, impartial and non-adversarial Custodian. After the Aberdeen press conference, he jumped right in and became an advocate on behalf of the State Bar. This is demonstrated by the page sheets of the deposition covers and his conduct during the so-called 'investigation'. He became an overly aggressive advocate and one that was basing his whole thought about the case upon incorrect understandings of the law For example, he stated that I was way off-base to say that it was quite possible that a Texas State Court would apply Texas punitive damages law. This showed that he just simply did not understand the holding of the Supreme Court of Texas

in Duncan vs. Cessna, where it held that, because New Mexico did not permit a remedy in a certain situation, New Mexico would have no governmental interest in that issue, and, therefore, under Texas Conflicts of Law Rules, Texas would have the dominant interest and Texas law would thus apply. Obviously the same thing would be true of punitive damages; since Scotland had not recognized punitive damages, it would have no 'governmental interest' in that issue and Texas, which does recognize punitive damages, would have the dominant governmental interest in same. Therefore, a Texas state court would probably apply Texas punitive law.

"On the 13th day September, Peterson, Smoot, Hampton, et al, filed a suit to revoke my probation and have me suspended for three years. In a very shocking procedural maneuver, they had Judge Casseb, who readily agreed to do anything they asked, set the revocation trial (not just a 'hearing') on the merits of the revocation petition just six days later, on the 19th day of September, 1988. Though I protested vigorously by way of Motion for Continuance and other motions, that my due process rights were being brutally violated and that such lack of notice did not comply with the Texas Rules of Civil Procedure, Judge Casseb callously overruled my motion, proceeded with the trial of the revocation matter on its merits on the 19th day of September and allowed the State Bar - even though I had no lawyer at that time, had not been given the time to engage in discovery (as the Agreed Judgment said I would have the right to do) and could not possibly

have been ready for trial - to put on its case. Again, all the constitutional violations that Judge Casseb callously engaged in are a matter of record and I need not repeat them one by one.

"Another very important one is the fact that Judge Casseb overruled my Plea in Abatement, to abate proceedings until the State Bar complied with Secs. 10-23 of Article 10 of the State Bar Rules (which deal with requiring the State Bar to process all new allegations of violations of the Disciplinary Rules through the Grievance Committee and thence allow a trial by Jury). In any event, the trial was nothing more than a kangaroo court. Judge Casseb wasn't the least bit interested in what I had to say or what evidence I might put on. He did allow everything to come in (on the ground that there it was a judge-trial and not a jury trial and that it would be presumed that he would disregard any inadmissible evidence), but it was impossible to tell what he did consider or what he did not consider. All through the trial I kept challenging the State Bar and Judge Casseb about the State Bar's burden, namely that - in view of the fact that the three communications in question, namely the press release, the ad and the letter, all contained disclaimers that we would not talk to any victim, but only with lawyers or Solicitors about potential litigation in Texas - in order for the State Bar to get around the First Amendment of the Constitution the State Bar would be compelled to show that the Solicitors and lawyers of Scotland were so brain-dead and incompetent that they could

not 'reasonably verify' the statements that were contained in the press release, ad and letter. Despite these challenges, the State Bar made no effort to demonstrate a legitimate and permissible State interest in regulating the public statements of one lawyer directed to other lawyers. It became apparent during the trial that Judge Casseb did not really care one way or the other because he already knew what he was going to do. It was immaterial to him that there were severe and substantial constitutional issues involved. He made it clear that he was going to follow his interpretation of the State Bar Rules and the Constitution be damned. A reading of his Findings of Fact, entered after he reached his decision, demonstrates that he simply was not going to deal with the constitutional issues involved, particularly the issues concerning the First Amendment. I requested repeatedly, in both my First Requested Findings of Fact and Conclusions of Law, and in the Amended Findings of Fact and Conclusions of Law, that Judge Casseb address those issues and make findings with regard thereto. But he refused to do so as one can see that from his Findings of Fact and Conclusions of Law. In truth, he simply acted as if I didn't have a right to raise constitutional issues in a trial before him.

"In any event, Judge Casseb callously entered a Judgment of Revocation, even though there was absolutely no evidence to justify such revocation and he suspended me for the maximum time he could, for three years. And now with the passage of time, the

truth has finally come out. The State Bar, through General Counsel Steve Peterson, has admitted publicly (in his conference with the Grievance Committee as reported by The Texas Lawyer and the other newspapers) that really the State Bar could not make a case on the 'solicitation' allegations that had been made against myself and O'Quinn. The press clippings also demonstrated that Steve Peterson, as many predicted, had protected and coddled John O'Quinn all along. The deal that Steve Peterson had tried to make with David Berg, who represented John O'Quinn back in 1987, could, know that Berg and O'Quinn were able to get rid of Tom Alexander, finally be made and consummated. Though the allegations against John O'Quinn were much more serious than those made against Benton Musslewhite, he was let off with a public reprimand, a hundred hours of public service and a fine which, to him, was nothing more than pocket change. Mr. Alexander was certainly correct when he called it a 'wrist-slap'. However, I have to say that I am not upset about the fact that O'Quinn got such a light punishment insofar as justice in the case is concerned, because, after what I have seen about the frivolousness of my case, I can see that most probably the case against him was frivolous also. What I do complain about, is the disparity of treatment between myself and O'Quinn. Mr. Peterson finally admitted that one of the primary reasons for the disparity of treatment was that John O'Quinn had $3,000,000.00 and I didn't. This is consistent with my investigation of the lawyers who generally have had discipline imposed against them (as

reported by the Texas Bar Journal)- the great majority of them are solo practitioners who are not rich. I have never seen discipline imposed against a high ranking member of one of the major law firms. Obviously they control the grievance committees and they don't let any grievance against their people see the light of day. An example of this is Gloria Chaplin's complaint against Committee 4-C. Moreover, Steve Peterson wouldn't dare take on any of the major law firms, even though, as the Appendices to my Supplemental Brief reflect, there have been allegations of very serious misconduct made against high ranking partners in BAKER & BOTTS and FULBRIGHT & JAWORSKI and many of the major law firms even when they had a complaint (e.g. Gloria Chaplin). Although the State Bar instituted an 'investigation' and a vendetta against me for 'solicitation' without any client complaint about solicitation, they dared not to institute any kind of 'investigation' or 'complaint' against the powerful large law firms. Therefore, what is said by Mr. Harrington and others about pervasive discrimination inherent in the disciplinary system of Texas - in that it discriminates against solo practitioners and less wealthy lawyers - is certainly true.

"In any event, as this thing has come down to the bottom line, it is now clear that the State Bar made a 'sacred cows' out of Kelly Newman just as they had made one out of John O'Quinn, and others. They did not file any kind of suit, or even conduct an investigation against Kelly Newman,

even though Newman was much more heavily involved in the Piper Alpha matter than I was (he was equally involved in the press conference and he ran the ad and sent the letter over my objections, with only his name on them). The State Bar did not prosecute John O'Quinn because of the Piper Alpha situation, even though he financed Kelly Newman's trip to Scotland, consulted with him on a day-to-day basis, and agreed to accept referrals of all cases that we were consulted on, both from me and from Kelly Newman.

"And there is other very telling evidence of selective enforcement and violation of my Equal Protection rights. When the State Bar announced its so-called crusade against 'solicitation' and that it would be investigating 'eight or more Houston lawyers', it was well known in the community that there was a certain lawyer who engaged in rank ambulance chasing. He had cubby holes in his office, occupied by investigators operating in old police cars and radios that could pick up police calls concerning automobile accidents. The minute a call would be received they would go to the scene of the accident, take pictures and then use the old bait-and -switch routine of trying to sell the pictures to the victims, but eventually switching to suggesting that they hire the lawyer for whom they worked. I have been told directly by this lawyer, whom we will refer to as Mr. X, and by others, that he paid over $100,000.00 in legal fees to the same David Berg who represented Mr. O'Quinn. At the time Mr. Berg represented Mr. X, he was still Chairman of another grievance

committee. The allegations against Mr. X, although they constituted a clear case of 'rank ambulance chasing', were buried and never saw the light of day. Yet I am prosecuted simply because I dared to hold press conferences. I say to this Court, in this Affidavit, that the cases that I have received over the last 12 years, when I had been the most active in personal injury, foreign seamen and toxic tort litigation, all have come to me through lawyers, clients, legitimate organizations, labor unions, and other sources that are legitimate and proper. I have never, and I emphasize never, engaged in rank ambulance chasing such as that done by Mr. X. Yet I am the scapegoat, I am the sacrificial lamb and Mr. X, Kelly Newman , John O'Quinn and Newton Schwartz have received 'wrist-slaps' for their punishment, or no punishment at all, while I have received the maximum punishment of three years suspension

"I should mention that Newton Schwartz told me that, when he accepted the sixty day suspension, he was going to take a nice vacation and it would be all over with. Even though Mr. Schwartz had been accused of converting client funds to his own use and benefit, the State Bar did not insist upon a probation or any punishment other than the sixty day suspension. There is no question in my mind but that my equal protection rights have been grossly violated by the manner in which the State Bar has singled me out for maximum punishment and let other lawyers similarly situated, or against whom allegations were even worse, go scot free or get off with 'wrist-slap' punishments.

"Lastly, I should mention that another rank indication of selective prosecution is the fact that in App E-34 to Supplemental Brief, the Houston Chronicle reports that James McNeilly named 'at least eight other lawyers in addition to O'Quinn' for whom he had run cases. This evidence was contained in an affidavit procured by Mr. Alexander. I was not one of the other 'eight', despite what Mr. Alexander had stated in the same article, because it is undisputed that I have never met James McNeilly in my life and he has never done anything for me. In any event, whether I was one of the eight or not, why did the State Bar not prosecute the other eight named by McNeilly? Eight more 'sacred cows'

"I want to make one more thing clear. During the trial in the trial court, both before and after judgment, I desperately tried to get Judge Casseb to grant supersedeas of the suspension judgment, pending my appeal. He knew, the State Bar knew and everyone knew that the unconstitutional suspension of me pending appeal, was destroying my law practice and having devastating consequences upon me. The harm to me and the adverse impact upon my ability to re-open my practice after winning the appeal is one of day-to-day harm- each day of suspension that goes by makes it harder for me to re-open my practice once the suspension is voided and that harm is irreparable. I have no uate remedy at law, other than supersedeas, and this has been denied to me so far by Judge Casseb, the Court of Appeals and the Texas Supreme Court. Sec. 24 of Art. X is unconstitutional as written because, as argued by Mr.

Smoot, it provides for a 'blanket' ban on supersedeas and applies regardless of the circumstances. But, at the very last, it is unconstitutional as applied in this case. I was never accused of, or charged with, or convicted of a crime or act involving moral turpitude. I have never been accused of, or shown to be, a threat to my clients or the public, as defined in Sec. 22 of Art. X. Though reportedly challenged by me to do so in the trial court and the appellate courts, the State Bar has never offered one scintilla of evidence to show that there is any conceivable police-power reason or permissible state interest for suspending me pending appeal. Indeed, Judge Casseb and the State Bar conceded otherwise in the trial court, because the State Bar agreed and Judge Casseb so found, that it would be in the interests of my clients for my suspension to be deferred from the date of the suspension judgment, in November of 1988, to and through January 31 of 1989. Therefore, the taking of my license pending appeal is unconstitutional because there is no justifiable reason for doing so.

"One last thing should be mentioned. The Court of Appeals has twice refused my motion for expediting and accelerating my appeal. It is now almost ten months since the appeal was perfected and this case has not yet been set for oral argument. Based upon my many years experience in handling appeals, it would appear to me that by the time the appellate process on the merits is completed in the Court of Appeals, the Texas Supreme Court and the U. S. Supreme Court, at least 2

years of suspension will have gone by and, in view of my age, 58, and the passage of this amount of time, even though I will eventually win my appeal I will be a dead-duck as far as starting up again in the law practice. So, the State Bar will have gotten what it improperly has wanted all along - to get rid of Benton Musslewhite forever- by the unconstitutional application of Sec. 24."

/s/ Benton Musslewhite
BENTON MUSSLEWHITE

SUBSCRIBED AND SWORN to before me the undersigned on this the 11th day of September, 1989.

/s/ Jane Hayes____
NOTARY PUBLIC
Harris County
STATE OF TEXAS

My commission expires:
10/19/92

APPENDIX S-1

Law Office of Benton Musslewhite, Inc.
Counselors of Law
609 Fannin
Houston, TX 77002
713/222-2288

June 28, 1986

Mr. Wayne Mansula
Suite 700
2000 L. Street, N.W.
Washington, D.C. 20036

RE: Agent Orange Litigation

Dear Wayne:

I hereby refer to you the following clients involved in the new Agent Orange suit in the Texas State Courts: Charles E. Brown, Ronald Lee Hartman, et.al., Dawn Marie Inman, et.al., Gary Thomas and Shirley Thomas, Shirley Zaleweski, James Donald Deloatch, Joyce Imagene Deloatch, and Jamical Galloway.

In the terms of referral previously expressed in a telephone conversation, you will be the Case Manager.

As I further advised, all cheques

for subsequent fees should be made payable to my Conservator, Mr. Hartley Hampton of YOUNG & HAMPTON, of Houston, Texas. He should also be kept advised of any further developments pertaining to the clients.

Mr. Hampton will contact you shortly with the necessary forms and inform you of your duties as the Case Manager.

Sincerely,

/s/ Benton Musslewhite

Benton Musslewhite

BM/dm

APPENDIX S-2

ASHCRAFT & GEREL
Attorneys and Counselors of Law
Suite 700
2000 L Street, N.W.
Washington, D.C. 20006
July 8, 1988

Benton Musslewhite, Esq.
609 Fannin, Suite 517
HOuston, TX 77002

Re:Hartman, Brown, Inman, Thomas,
Zaleweski, Deloatch and Galloway

Dear Benton:

I am in receipt of your letter dated June 28, 1988 in regard to the above-captioned cases. Please be informed that I will be happy to work with you on these cases and it is my understanding from our recent telephone conversation that the only case that we will be pursuing at the present time will be the Ronald L. Hartman case that was filed on June 22, 1988 in Jefferson County, Texas. We will use this case as a test case before getting involved in litigation with the other cases.

Also, I will be looking forward to correspondence from Mr. Hampton so that we might work out the appropriate fee arrangement in these cases. It is my understanding that we will be allocating fees based on the amount of work that is performed by you and me in this matter. However, it might be appropriate to try to delineate a percentage at this time to be modified in case our contributions do not meet our anticipations.

I will look forward to discussing this matter further with Mr. Hampton.

Very truly yours,

/s/ Wayne M. Mansulla
Wayne M. Mansulla

WMM/mc

APPENDIX S-3

POWER OF ATTORNEY

I, the undersigned, have employed Wayne Mansulla of ASHCRAFT & GEREL, in Washington, D.C., by referral, from the LAW OFFICES OF BENTON MUSSLEWHITE, INC., to be my attorney(s) to prosecute and collect all claims and causes of action for personal injuries and/or damages sustained as a result of exposure to Agent Orange between December, 1967 and December, 1968. These claims and causes of action which occurred in Vietnam are asserted against Diamond Shamrock, et al.

I do authorize Wayne Mansulla of ASHCRAFT & GEREL, to act as my negotiator to file pleadings and appear in Courts of law on my behalf, and to perform any and all functions which to him may seem reasonably necessary in the prosecution of my claims and the

preservation of my rights.

In consideration of the said services rendered and to be rendered by the said Wayne Mansulla of ASHCRAFT & GEREL in the prosecution of my claim or cause of action, I hereby now set over and assign to Wayne Mansulla of ASHCRAFT & GEREL as an assignment with the undivided interest in said claims or cause of action as follows:

33-1/3% interest if settlement is made before suit is filed;

40% interest if collection or settlement is made after suit is filed;

5% additional interest if the suit is tried and judgment is entered therein, and the same is appealed to the appellate courts.

It is agreed that the costs of Court and reasonable expenditures made by Wayne Mansulla of ASHCRAFT & GEREL in

his handling of my claims and causes of action shall be refunded to him from my portion of said recovery or settlement. In the event there shall be more than one of the undersigned, the singular shall be taken to mean the plural.

It is also agreed that my claim or cause of action can be referred to any other attorney as may be deemed necessary by my attorney(s) for the purposes of joint-venturing said case.

Executed this the 2nd day of August, 1988.

/s/Katherine H. (Mrs. Ronald L.)Hartman

9602 Philmont Drive, Houston, TX 77010

APPENDIX T

NO. 86-44452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
V.	[]	HARRIS COUNTY, TEXAS
BENTON MUSSLEWHITE	[]	270TH JUDICIAL DISTRICT

NO. 87-24402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
V.	[]	HARRIS COUNTY, TEXAS
BENTON MUSSLEWHITE	[]	151ST JUDICIAL DISTRICT

MOTION TO REVOKE PROBATION

TO THE HONORABLE JUDGE OF SAID COURT:

Movant, the State Bar of Texas, moves the Court to revoke the probation os Benton Musslewhite, showing the Court:

I.

DISCIPLINARY JUDGMENT

A. On November 10, 1987, the Court called these disciplinary actions to

trial. Petitioners, the Grievance Committee for State Bar District Nos. 4-A and 4-C, State Bar of Texas, appeared counsel and by the District 4-C, Grievance Committee chairman, and Respondent, Benton MUsslewhite, appeared in person and by counsel. Counsel for Petitioners announced ready for trial. Counsel for Respondent announced not ready for trial. After the Court overruled Respondent's Motion Continuance along with various other dilatory motions, Respondent sought to enter into settlement negotiations. The Court permitted the parties to discuss prospective settlement. Thereafter, the parties announced to the Court that they agreed to withdraw this disciplinary action from consideration by the Court, that they waived trial by jury, and that the Court should enter judgment pursuant to the agreement of the parties.

B. The Court signed a Judgment in conformity with the agreement of the parties, on January 29, 1988, providing, impertinent part:

IT IS THEREFORE ORDERED that Respondent be suspended from the practice of law for a period of ninety (90) days, beginning on November 1, 1989, and ending on January 30, 1989.

IT IS FURTHERED ORDERED that the Court may upon written request of Respondent showing good cause and with the recommendation of the custodian, hereafter enter an order delaying commencement of the ninety (90) days suspension until no later than August 1, 1989.

. . .

IT IS ALSO ORDERED that Respondent be suspended from the practice of law for a period of three (3) years.

IT IS FURTHER ORDERED that imposition of the three (3) year suspension shall be suspended and Respondent shall be placed on probation for a period of three (3) year commencing on February 1, 1988 and ending on February 1, 1991, under the following terms and conditions during the term of probation:

1. Respondent shall not commit professional misconduct as defined by the State Bar Rules art. X, Sec. 7;
2. Respondent shall accept no new employment by clients until November 1, 1988, although Respondent may refer potential client to other attorneys:

. . .

II.

AGENT ORANGE SUIT

In April of 1988, Ronald L. Hartman and Katherine H. Hartman employed

Respondent to pursue claims resulting from Mr. Hartman's possible exposure to Agent Orange. Mrs. Hartman executed Power of Attorney on behalf of Mr. Hartman and herself employing the Law Officers of Benton Musslewhite, Inc. for such purpose. On June 22, 1988, Respondent filed a Plaintiff's original Petition in the 60th Judicial District Court of Jefferson County, Texas, under cause number B-129273, on behalf of Ronald L. Hartman and Katherine H. Hartman and as Next Friend of Jeffrey Alan Hartman and Angela Marie Hartman, Both Minors Individually and as Representatives of Those Similarly Situated". After the filing of the lawsuit, Respondent proceeded to conduct a news conference to announce his filing of a new so-called "Agent Orange" lawsuit. Respondent's acceptance of employment by the Hartman's and the class action

claimants violated the terms of probation.

III.

A. On July 6, 1988, the Piper Alpha oil platform located in the North Sea far of the coast of Aberdeen Scotland, exploded, killing or injuring some 166 men. After learning of the tragedy, Respondent contacted John O'Quinn, a Houston lawyer, about whether O'Quinn would handle any of the Piper Alpha cases in Texas courts, and Respondent states that O'Quinn agreed to accept cases procured by Respondent, O'Quinn, has stated that he had nothing to do with Musslewhite being in Scotland. Respondent also contacted Kelly Newman, also a Houston Lawyer, about going to Scotland with Respondent to seek Pipe Alpha clients, and Newman agreed to go in anticipation of securing clients and receiving a portion of any eventual attorneys' fees.

B. On July 15, 1988, Respondent and Newman called a news conference in Aberdeen, Scotland where they distributed a news release, a copy of which is attached hereto as Exhibit "1". The news release is false and misleading. The reference to a "team of internationally renowned Lawyers" is false or misleading because the release never identified these lawyers The statement that the team "would be working with U.K. Solicitors to represent victims or families of victims involved in the Piper Alpha tragedy" is false or misleading because it suggests that the team already had Piper Alpha clients. The description of Respondent as the "team:s lead counsel" is false or misleading because the release never discloses that the Judgment prevents Respondent from accepting new employment byu clients and that Respondent will be suspended

for ninety (90) days, and because Respondent's arrangement with O'Quinn was for O'Quinn to be lead counsel. The quote that the "team of attorneys I am leading are some of the best in the world at handling mass disaster litigation" is false or misleading because the release never identifies the lawyers, the releases never discloses that the Judgment prevents Respondent from accepting new employment by clients and that Respondent will be suspended for ninety (90) days, and the quote is a statement of opinion as to the quality of legal services. The release also fails to name the lawyers responsible for the performance of the legal services in the area of law broadcasted or to state "Not certified by the Texas Board of Legal Specialization".

C. Respondent and Newman thereafter took out an advertisement in the local

Aberdeen newspapers, a copy of which is attached hereto as Exhibit "2". The advertisement is false and misleading. Again, the reference to a "term of internationally renowned American Lawyers experienced in handling damage claims in mass disasters in the USA and Europe" is false or misleading because it never identifies these lawyers and is not susceptible to reasonable verification by the public. The statement that the team "are now in Aberdeen" is false or misleading because Respondent, who is not named in the advertisement, had already left Aberdeen, O'Quinn never was in Aberdeen regarding Piper Alpha, and Newman, who is the only lawyer named in the advertisement, is in no fashion internationally renowned. The advertisement also fails to name the lawyers responsible for the performance for the performance of the

legal services in the area of law advertised or to state "Not certified by the Texas board of Legal Specialization".

2. Newman in concert with Respondent then mailed on behalf of the "team" form letters directly to the victims or their families, a copy of which is attached hereto as Exhibit "3". The letter is false and misleading. And again, the reference to a "group of internationally renowned trial lawyers in the United States" is false or misleading because it never identifies these lawyers and is not susceptible to reasonable verification by the public. The statement that the team is "currently having discussions with a number of U.K. solicitors with a view to filing suit in the state court of Texas to obtain maximum damages" is false or misleading because it suggests that team already had Piper Alpha

clients and because it is a prediction of future success. Furthermore, the Solicitors Practice Rules of 1987, a copy of which are attached hereto as Exhibit "4", which set out the ethical rules for Scottish lawyers with respect to advertising and solicitation, prohibit targeted, direct mail solicitation and would subject Respondent to discipline were he a Scottish solicitor.

Movant prays that the Court conduct an evidentiary hearing and thereafter determine whether Respondent has violated any terms of probation, and in which case enter an Order revoking probation and imposing suspension from the practice of law for three (3) years, and/or impose another additional terms, conditions, or length of probation the Court deems appropriate.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL

STATE BAR OF TEXAS
P. O. Box 12487
Austin, Texas 78711
512/463-1440

/s/ Steven M. Smoot
Steven M. Smoot
First Assistant General Counsel
State Bar Card No. 18774300

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Revoke Probation has been served on Benton Musslewhite by delivery of a true copy to him at 609 Fannin, Suite 517, Houston, Texas 77002, by hand deliver and by certified mail, return receipt requested, and regular mail, by depositing them in properly addressed and posted wrappers with the United States Postal Service on September 12, 1988.

/s Steven M. Smoot
Steven M. Smoot

APPENDIX T-1

EXHIBIT 1

NEWS RELEASE

FOR IMMEDIATE USE

Arberdeen - 15 July 1988. A team of internationally-renowned US lawyers based in Houston, Texas, revealed today that they would be working with UK solicitors to represent victims or families of victims involved in the Piper Alpha tragedy.

The team's lead counsel, Benton Musslewhite, has been extensively involved in mass disasters. These include the Ranger I disaster, Ocean Ranger sinking, Agent Orange litigation, Harris County Dumpsite cases and the Amarillo Cotton Farm disaster.

The defendants likely to be involved in Piper Alpha litigation all have their corporate headquarters in the US, with a

number of these being in Texas. This is significant because the Texas state courts are open to foreign as well as domestic plaintiffs and litigation pursued through state, rather than federal, courts is usually more successful.

Until recehtly, there had been some law to the effect that the state courts would have to apply the federal forum non conveniens law. However, a recent case before the US Supreme court won by Mr. Musslewhite means that Texas can retain its own jurisdiction when dealing with actions raised by foreign plaintiffs.

"The jurisdictional complexities and favorable punitive damages law make Texas the best place for suit to be filed by victims or victim's families of this tragedy," commented Mr. Musslewhite.

I would stress that my team will not accept any cases except through Scottish

or UK-based solicitors.

"The team of attorneys I am leading are some of the best in the world at handling mass disaster litigation and one of our hallmarks is that we work to obtain a recovery or a settlement on a separate, individual basis.

"We will not allow any packaging of settlements in group lots. The tragic aspect of packaging settlements, which has been customary in mass tragedies handled by some other attorneys, is that the persons with the greater damage are penalised for the benefit of those with lesser damages.

"It is our belief that each client's case stands on its own footing and the value of each client's case must be separately considered and finalised. I think this is important to clients."

Ends 15 July 1988

Issued on behalf of Benton Musslewhite

Inc by John Macdonald, PR Consultants Scotland. Tel 0224 325326 (office), 02224 311448 (home).

Further information: Kelly Newman
Tel: Aberdeen
(0224) 589101.

APPENDIX T-1
EXHIBIT 2

PIPER ALPHA DISASTER

DAMAGE CLAIMS

A team of internationally renowned American lawyers experienced in handling damage claims in mass disasters in the USA and Europe are now in Aberdeen and willing to talk to victims, families of victims and their solicitors in respect of claims arising from the Piper Alpha disaster.

Our team includes the attorneys who handled the recent case in which the US Supreme Court established the right of foreign plaintiffs to have jurisdiction in the state courts in America determined under state law rather than federal law and the attorney who obtained the largest verdict ever for one family in a wrongful death case

(over $50 million).

We believe the best courts for pursuing claims are the state courts of Texas and Louisiana, because we believe we can retain jurisdiction over cases in these courts and that the recoveries possible will be substantially higher and we can recover punitive, as well as actual damages in those courts. We believe the Piper Alpha disaster is one in which punitive, as well as actual, damages should be awarded.

We truly agree with the sentiments expressed by the offshore oilmen's unions that every possible step should be taken to guarantee the safety of workers' offshore. This can be achieved partly through union recognition, but also through the pursuit of punitive damage claims which will force oil multinationals to adopt stronger safety measures.

We understand that the Scottish Law Society has warned against directly employing U. S. attorneys and our team agrees with those suggestions. It is our policy not to take any cases except through Scottish or U.K. solicitors. However, we understand that there has been a suggestion by some Scottish solicitors that only one American law firm handle all cases. We respectfully suggest that it is not in the interest of victims or their families to pool all cases into one American firm, any more than it would be good to pool all cases into one U.K. firm.

There has been a trend among some American Attorneys to package cases for settlement purposes. We do not believe this is a good practice. Packaging cases means that the better cases are penalized for the benefit of the less

valuable cases. We believe it is our solemn duty to see to it that each case is settled separately, on an individual basis and not packaged for settlement purposes, as so many other American firms are prone to do. Therefore, we respectfully suggest it is in your interest to have your solicitor call us immediately or that you call us immediately and give us the name, address and phone number of your solicitor or the solicitor you propose to employ. The call should be made to Kelly Newman, Aberdeen 589101 (Room 215), Imperial Hotel, Surling Street, Aberdeen). Please leave your name and telephone number if for any reason I am not there or my line is busy.

Kelly Newman

of Houston Texas

APPENDIX T-1
EXHIBIT 3

LAW OFFICES
OF
KELLY L. NEWMAN
ATTORNEY AT LAW
350 North Belt Suite 234
Houston, Texas 77060
(713) 448-1173

July 18, 1988

All Victims or Familes of Victims of the Occidental Petroleum Platform Disaster

I am an American attorney and I represent a group of internationally renowned trial lawyers in the United States. We are currently having discussions with a number of U.K. solicitors with a view to filing suit in the state court of Texas to obtain maximum damages for the victims and/or their families.

I know you have seen a great deal of publicity about American lawyers and that you have been advised by your own solicitor or lawyer. We agree with that advice and we will not accept any

cases except through your own solicitor or lawyer.

The purpose of this letter is to ask that if you have already retained a solicitor to let us know who that solicitor is so that we can discuss the suit that we are bringing in the United States with him. If you have not retained a solicitor then we would advise that you do so as a matter of urgency and ask him to contact us so that we can discuss the action in the United States.

I will be at the Imperial Hotel, Stirling Street, Aberdeen (tel: 0224 589101) for all of this week. If for any reason you have not retained a solicitor until after I leave Scotland, please call me at my office in Houston, Texas (tel: (713) 448 1173).

With kind regards,

/S/ Kelly

Kelly Newm

ewman
n

APPENDIX T-2

STATE BAR OF TEXAS

September 13, 1988

Mr. Ray Hardy
District Clerk
P. O. Box 4651
Houston, Texas 77210

RE: Cause No. 86-44452; The State Bar of Texas v. Benton Musslewhite (Consolidated); in the 270th Judicial District of Harris County, Texas

Cause No. 87-24402; The State Bar of Texas v. Benton Musslewhite (Consolidated); in the 151st Judicial District Court of Harris County, Texas

Dear Mr. Hardy:

Enclosed for filing in connection with the above referenced matter is the Notice of Oral Hearing.

Please acknowledge the filing of the enclosed instrument by file stamping the additional copy of this letter enclosed and kindly return the copy and

filing receipt to the undersigned.

By copy of this letter copies of the enclosed are being provided to all counsels of record.

Thank you for your cooperation and assistance in this matter.

Sincerely,

/S/ Steven M. Smoot
Steven M. Smoot
First Assistant General Counsel

SMS:rm
Enclosures

cc: Mr. Benton Musslewhite (CMRRR #P818 815 867) and Hand Delivery
Mr. Hartley Hampton (CMRRR #P818 815 868) and Hand Delivery

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Oral Hearing has been served on Benton Musslewhite by delivery of a true copy to him at 609 Fanmnin, Suite 517, Houston, Texas 77002, by hand delivery and by certified mail, return receipt requested, and also has been served on Hartley Hampton by delivery of a true copy to him at 1301 McKinney, Suite 3400, Houston, Texas 77010, by hand delivery and by certified mail, return receipt requested, by depositing them in properly addressed and posted wrappers with the United States Postal Service, on September 13 , 1988.

/S/ Steven M. Smoot
Steven M. Smoot

STATE BAR OF TEXAS

FILED
RAY HARDY DIST. CLERK
HARRIS COUNTY, TEXAS
1988 SEP 13 PM 3:04

September 13, 1988

Mr. Ray Hardy
District Clerk
P.O. Box 4651
Houston, Texas 77210

RE: Cause No. 86-44452; The State Bar of Texas v. Benton Musslewhite (Consolidated); in the 270th Judicial District Court of Harris County, Texas

Cause No. 87-24402; The State Bar of Texas v. Benton Musslewhite (Consolidated); in the 151st Judicial District Court of Harris County, Texas

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Sincerely,

Steven M. Smook

Steven M. Smook
First Assistant General Counsel

SMS:rm
Enclosures

cc: Mr. Benton Musslewhite (CMRRR #P818 815 867) and Hand Delivery
Mr. Hartley Hampton (CMRRR #P818 815 868) and Hand Delivery

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Steven M. Smoot

APPENDIX T-3

NO. 86-44452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT
	[]	COURT OF
	[]	
V.	[]	HARRIS COUNTY,
	[]	TEXAS
	[]	
BENTON MUSSLEWHITE	[]	270TH JUDICIAL
	[]	DISTRICT

NO. 87-24402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT
	[]	
V.	[]	HARRIS COUNTY,
	[]	TEXAS
	[]	
BENTON MUSSLEWHITE	[]	151ST JUDICIAL
	[]	DISTRICT

NOTICE OF ORAL HEARING

TO: Benton Musslewhite, 609 Fannin, Suite 517, Houston, Texas 77002

PLEASE TAKE NOTE that hearing has been set on Petitioner's Motion to Revoke Probation and will be held before the Honorable Solomon Casseb on Monday, the 19th day of September, 1988, at 9:00 o'clock a.m. in the court room of the 270th Judicial District Court or such

other court room as may be designated by the Judge presiding.

Respectively submitted,

OFFICE OF THE GENERAL COUNSEL
STATE BAR OF TEXAS
P. O. Box 12487

Austin, Texas 78711
(512) 463-1440

/S/ Steven M. Smoot

Steven M. Smoot
First Assistant General Counsel
State Bar Card No. 18774300

APP. T.B

NO. 86-44452 (CONSOLIDATED)

HE STATE BAR OF TEXAS	§	IN THE DISTRICT COURT OF
.	§	HARRIS COUNTY, T E X A S
ENTON MUSSLEWHITE	§	270TH JUDICIAL DISTRICT

FILED
MAY MUNDY DISTRICT CLERK
HARRIS COUNTY, TEXAS
1988 SEP 13 PM 4:04
BY Deputy

NO. 87-24402 (CONSOLIDATED)

HE STATE BAR OF TEXAS	§	IN THE DISTRICT COURT OF
.	§	HARRIS COUNTY, T E X A S
ENTON MUSSLEWHITE	§	151ST JUDICIAL DISTRICT

NOTICE OF ORAL HEARING

O: Benton Musslewhite, 609 Fannin, Suite 517, Houston, Texas 77002

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Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
STATE BAR OF TEXAS
P.O. Box 12487
Austin, Texas 78711
(512) 463-1440

Steven M. Smoot
First Assistant General Counsel
State Bar Card No. 18774300

APPENDIX U

(Excerpts from)

NO. 86-44452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
V.	[]	HARRIS COUNTY, TEXAS
BENTON MUSSLEWHITE	[]	270TH JUDICIAL DISTRICT

NO. 87-24402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
V.	[]	HARRIS COUNTY, TEXAS
BENTON MUSSLEWHITE	[]	151ST JUDICIAL DISTRICT

SECOND AMENDED MOTION FOR CONTINUANCE AND/OR ADJOURNMENT WITH RESPECT TO MOVANT'S MOTION TO REVOKE PROBATION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Respondent, BENTON MUSSLEWHITE, and moves the Court for a continuance and/or in the alternative for an Adjournment and for such Motion would respectfully show the Court as follows, to-wit:

I.

The Notice of Hearing on the Movant's "Motion To Revoke Probation" was not served upon the Respondent until September 13, 1988 for a hearing on September 19, 1988. The time period between the date of notice of such hearing and the date of such hearing is not sufficient to enable the Respondent to properly prepare and defend himself with respect to the Motion To Revoke his probation. Such notice is not adequate; such notice is not reasonable; such notice does not comport with the standards of due process and is in violation of the Constitution of the United State, including the Fourteen Amendment, and the Constitution of the State of Texas. While the Disciplinary Judgment referred to in the Motion requires that a hearing be conducted within forty-

five (45) days, there is nothing in said judgment, nor could there be, which could provide for a suspension of due process protections for the Respondent and/or for the requirement that he be given reasonable notice of any hearing on a "Motion To Revoke Probation". Three (3) working days notice with respect to such a serious Motion cannot possibly be conceived of, in any court in the land, as reasonable and adequate notice.

. . .

III.

Moreover, the allegations contained in the "Motion To Revoke Probation" necessitates discovery far beyond the depositions that have already been taken. The Disciplinary Judgment specifically provides that, if the Movant should attempt to revoke probation, Respondent would have the right of discovery and all other rights

accorded an adversary party in court proceedings in Texas (with the exception of the right of trial by jury). Accordingly, your undersigned counsel believes that it is absolutely necessary that discovery be engaged in by Respondent so that the true facts can be developed and so that the rights of Respondent can be protected. As an example of the proper discovery, there is attached hereto as Exhibit A, a copy of Interrogatories and Requests for Production and Notices of Deposition concerning the development of the evidence relevant to allegations in the Motion to Revoke. These Interrogatories and Requests for Production and Notices of Depositions are reasonable undertakings that must be engaged in, in order for due process to be accorded Respondent and the terms of the Disciplinary Judgment does require that such rights be accorded

the Respondent. It is obvious that discovery cannot be accomplished in three (3) working days.

IV.

Pursuant to Rule 252, Texas Rules of Civil Procedure, Respondent certifies that a number of relevant and material witnesses cannot possibly be available for the hearing on this Motion to Revoke now set for September 19, 1988. These witnesses include, but are not limited to: John McDonald, Tony Sandilands, and Brian Fitzgerald, all of Scotland; John O'Quinn, who is in trial in Wharton, Texas and will continue to be in trial for the next two weeks; various experts Respondent may wish to call with respect to Scottish law; and Katherina Hartman, who will be in California all of next week.

V.

In addition, Respondent's counsel,

Ray Bass, is presently in trial in Williamson County, Texas in a criminal case which will continue into the week of the 19th and he cannot possibly be present for any hearing on the 19th. As long as the hearing was going to be simply an evidentiary hearing, counsel had not deemed it necessary to attend, but since the Movant, upon three (3) working days notice, has now, in clear disregard for due process rights and the terms and provisions of the Disciplinary Judgment (e.g., allowing the Respondent a reasonable chance for discovery) converted such hearing into a hearing upon a "Motion To Revoke Probation", it is quite clear that the undersigned counsel must be present in order to protect Respondent's rights and that Respondent is clearly, under the laws of Texas and of the United States, entitled to have his counsel present for such a serious hearing.

And, as undersigned counsel now certifies, he cannot possibly be present on September 19, upon such short notice because of the fact that he is in trial in Williamson County, Texas in a criminal case, which is definitely going to continue into next week.

VI.

In addition, the Respondent himself has been unable to take any steps to prepare, even if he had received more than three (3) days notice before the hearing, which he did not, because he has been in trial in the case of Pollock v. Vickers & Vickers, Inc., in the 295th Judicial District Court of Harris County, Texas, and that trial was, just yesterday, completed. Because of the time consumed in that trial, the Respondent has not had sufficient time to work with Respondent's counsel in order to

prepare for a serious Motion, such as the "Motion To Revoke Probation".

VII.

In sum, neither the Respondent nor Respondent's counsel has had enough time, nor are being given enough time to prepare , to defend against the Motion To Revoke Probation filed by Respondent. Nor was the notice sufficient time so that counsel for Respondent, Mr. Ray Bass, could be present. Nor is Respondent being given enough time to engage in material discovery. Nor is he being given enough time to depose important material witnesses, and, in addition, neither can the material witnesses appear on time. Therefore, for all the foregoing reasons stated above, there clearly exists good cause for a continuance of this case to a time, to be re-set by the Court, which will be convenient to the Court and the parties

and will give the Respondent sufficient time to engage in discovery and prepare to defend himself with respect to the Motion to Revoke.

VIII.

In the alternative and only in the alternative, if the Court denies the "Motion For Continuance", then without waiving the right to complain about the failure to grant such "Motion for Continuance", Respondent requests the Court, at the very least, to adjourn the hearing on September 19, 1988 to a later time, in order to give the Respondent sufficient time to develop discovery and prepare to defend himself, so that the Respondent can complete discovery and present Respondent's side of the case and thus due process can be accomplished.

WHEREFORE, PREMISES CONSIDERED, Respondent prays the Court to continue this cause from the setting of

September 19, 1988, with respect to the Movant's "Motion To Revoke Probation" and/or, in the alternative and only in the alternative, to adjourn the setting to a later time so that discovery can be engaged in and Respondent can prepare for a hearing upon the Motion To Revoke.

Respectfully submitted,

/s/ Ray Bass by permission
RAY BASS
P. O. Box 237
Austin, Texas 78767
(512) 478-2277
TBA #01884000
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been forwarded to all counsel of record by placing same in the United States Mail, first class, postage prepaid on this the 16th day of September, 1988.

/s/ Ray Bass by permission
RAY BASS

APPENDIX V

NO. 86-44452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
	[]	
V.	[]	HARRIS COUNTY, TEXAS
	[]	
BENTON MUSSLEWHITE	[]	270TH JUDICIAL DISTRICT

NO. 87-24402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
	[]	
V.	[]	HARRIS COUNTY, TEXAS
	[]	
BENTON MUSSLEWHITE	[]	151ST JUDICIAL DISTRICT

RESPONDENT'S ORIGINAL ANSWER
AND OPPOSITION TO MOTION TO REVOKE
PROBATION FILED BY MOVANT
THE STATE BAR OF TEXAS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Respondent in response and in answer to the Motion to Revoke Probation filed by Movant, the State Bar of Texas, and would respectfully show the Court, the following, to-wit:

I.

Plea in Abatement

A. Plaintiff hereby moves to abate all allegations under paragraph Roman Numeral III entitled Piper Alpha Tragedy", including subparagraphs A,B,C, and D, and would respectfully show that the Agreed Judgment entered by this Court January 29, 1988 (hereinafter referred to as "Agreed Judgment"), does not, and could not, in any way with respect to any new allegations of professional misconduct on the part of Respondent, waive or obviate the requirements contained in the State Bar Rules, the Texas Code of Professional Responsibility and the Disciplinary Rules, including, but not limited to Sections 10, 11, 14, and 16, to the effect that Respondent, with respect to any new allegations of misconduct, is entitled to a complaint

being filed with the Grievance Committee; a screening of such complaint by the Grievance Committee; if appropriate, an investigation by counsel for the Grievance Committee; notice to the Respondent from the Grievance Committee that "he is the subject of an investigation"; delivery to Respondent of a copy of the allegations against him, with the request that he respond in writing to the Grievance Committee; a decision by the Grievance Committee as to whether the matter should be classified as a complaint and then pursued to disposition, or whether it should be rejected as a complaint; the conduct of an investigatory hearing, if the complaint is not rejected, with notice to Respondent of least twenty-five days prior to the conduction of such hearing; the allowance of Respondent to appear and testify at such hearing,

with his counsel, "to present evidence in his own behalf", and to appeal to the Review Committee, if Respondent is not satisfied with the ruling of the Grievance Committee; should the Grievance Committee reach an adverse decision, then service of such decision in the form of a judgment upon the Respondent; the right of nonacceptance by the Respondent with a right of trial De novo in a district court; the right of trial by jury in the district court on such new alleged misconduct, with the Petitioner having the burden of proving its case by a preponderance of the evidence; and all other rights accorded to the Respondent with respect to alleged new misconduct proceedings by the Texas Code of Professional Responsibility; the Disciplinary Rules; the State Bar Rules; the Texas Rules of Civil Procedure; the Statutes and Constitution of the State of Texas; and

the Constitution of the United States, particularly the Due Process Clause contained in the Fourteenth Amendment.

Once new misconduct is found against the Respondent and finding becomes final after Respondent has been furnished all of the foregoing due process protections, then, and only then, can the State Bar utilize such final judgment of new misconduct as a basis for revoking Respondent's probation in this cause. At that point - once the Motion To Revoke Probation on the basis of a final judgment with respect to the new misconduct has been filed - Respondent concedes that he would then only have the protections accorded him on pages 4, and 5 of the Agreed Judgment.

Therefore, since all of the allegations contained in Roman Numeral III entitled "Piper Alpha Tragedy" pertain to alleged new misconduct on

the part of Respondent, Respondent respectfully requests the Court to abate the Motion To Revoke on such grounds, until and unless, the State Bar of Texas complies with the requirements of Sections 10, 11, 14, and 16 of the Texas Code of Professional Responsibility, the State Bar Grievance Rules, the State Bar Rules, the Disciplinary Rules, the Texas Rules of Civil Procedure, the Statutes and Constitution of the State of Texas and the Fourteenth Amendment of the Constitution of the United States of America.

B. With respect to all allegations contained in the Motion To Revoke Probation, Respondent respectfully requests the Court to abate same, until, and unless the State Bar complies with the provisions of the Agreed Judgment on pages 4 and 5 thereof and with respect to due process

under the Constitution of Texas and of the United States, and particularly until Respondent has had the opportunity to "invoke the discovery provisions" of the Texas Rules of Civil Procedure. In this connection, Respondent would show that the Motion to Revoke Probation was not filed until Monday, September 12, 1988 and Respondent was not served with Notice of Hearing upon such Motion until Tuesday, September 13, 1988, with the hearing to be just three working days later, September 19, 1988. Respondent, upon receipt of such Notice, immediately instituted discovery with Notices of Depositions, Interrogatories and Requests for Production. Since the Rules require a minimum time for response or at least reasonable time for response to deposition, interrogatories and production discovery (see Rules 167, 168 and 200

of T.R.C.P.), and it is obvious that the time between the date that the State Bar filed its Motion to Revoke Probation and the date that it set such matter for hearing was far less than that time necessary to enable Respondent to conduct discovery pursuant to the Texas Rules of Civil Procedure. Since such right of discovery in a revocation proceeding is guaranteed to Respondent by paragraph 4, page 4 of the Agreed Judgment, we respectfully urge the Court to abate these proceedings until Respondent has been given the reasonable right of discovery guaranteed to him by the Agreed Judgment and due process.

. . .

/s/Ray Bass by permission
RAY BASS
P. O. Box 237
Austin, Texas 78767
(512) 478-2277
TBA #01884000
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been forwarded to all counsel of record by placing same in the United States Mail,, first class, postage prepaid on this the 20th day of September, 1988.

/s/Ray Bass by permission
RAY BASS

APPENDIX W

No. 86-44452 (Consolidated)

THE STATE BAR OF TEXAS	[]	IN THE
	[]	DISTRICT
	[]	COURT
	[]	
	[]	
	[]	OF
	[]	
V.	[]	HARRIS COUNTY,
	[]	TEXAS
	[]	
BENTON MUSSLEWHITE	[]	270TH JUDICIAL
	[]	DISTRICT

NO. 87-24402 (Consolidated)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT
	[]	COURT
	[]	
	[]	OF
	[]	
V.	[]	HARRIS COUNTY,G
	[]	TEXAS
	[]	
BENTON MUSSLEWHITE	[]	151ST JUDICIAL DISTRICT

MOTION OF RESPONDENT PURSUANT TO RULE 47 (a), (h), (i), (j) AND (k) OF THE TEXAS RULES OF APPELLATE PROCEDURE FOR SETTING OF SECURITY AND SUSPENSION OF THE ENFORCEMENT OF JUDGMENT REVOKING PROBATION, PENDING APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Respondent BENTON

MUSSLEWHITE, and with respect to the above respestfully moves the Court as follows:

I.

Pursuant to Rule 47 (a), (h), (i), (j) and (k) of the Texas Rules of Appellate Procedure, Respondent would show that the Judgment Revoking Probation entered by this Court on November 21, 1988, is one involving "a subdivision of the State"; is one wherein "the judgment holder has no pecuniary interest in it and no monetary damages can be shown"; and therefore is the type of judgment wherein the Court should set "security" for the "suspension of enforcement" of said Judgment, in an "amount and type" which is reasonable and which is sufficient to secure the State Bar "if the appeal is not prosecuted with effect". See Rule 47 (h) of the Texas

Rules of Appellate Procedure.

II.

In connection with the foregoing, Respondent would show that Respondent has already filed an Appeal Bond with the Clerk and that the amount of the "security," pursuant to Rule 47 (h) should be nominal in view of the fact that the Judgment Revoking Probation does not call for the payment of money damages.

III.

Your Respondent would further show in connection with the foregoing that this Court has continuing jurisdiction to set such security deposit. See Rule 47 (k) of the Texas Rules of Appellate Procedure.

IV.

Pursuant to Rule 47 (i) of the Texas Rules of Appellate Procedure,

Respondent requests the Court to require a "deposit" in lieu of bond and order the Clerk to issue the certificate referred to in Rule 47 (i) of the Texas Rules of Appellate Procedure, upon the making of such deposit by Respondent.

V.

Pursuant to Rule 47 (j) of the Texas Rules of Appellate Procedure, Respondent requests the Court to order the Clerk to issue a writ of supersedeas suspending, pending appeal, the provisions of the Judgment Revoking Probation, including
provision ordering the suspension of Respondent's law license effective January 31, 1989.

VI.

Your Respondent would further show that Section 24, Article X of the State Bar Rules does not bar this Court from

granting the required supersedeas and or suspension of the terms of the Judgment Revoking Probation for the following reasons: (a) when Section 24, Article X of the State Bar Rules is construed in pari materia with Section 22, Article X of the State Bar Rules, the preclusion of supersedeas or the suspension portion of a judgment against an attorney should apply only where such attorney has been determined to be an immediate and irreparable threat to such attorney's clients and/or the public pursuant to the provisions of Section 22, Article X of the State Bar Rules. It is undisputed that the Bar has never requested, nor has the Court ever determined, that the Respondent is an immediate and irreparable threat to his clients and the public pursuant to Section 22, Article X of the State Bar Rules; (b)

in the alternative, if the Court refuses to construe Section 22, Article X of the State Bar Rules as suggested in (a) above, then Section 24, Article X of the State Bar Rules is unconstitutional as written and/or applied in that it violates the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States. This is so because it calls for an unreasonable and unnecessary exercise of the State's police power with respect to Respondent's property, his license to practice law, by taking same pending appeal without any police power reason for doing so, in violation of the Fifth Amendment; constitutes an excessive fine or bail and unreasonable punishment in violation of the Eighth Amendment; and constitutes a violation of Respondent's rights under the Equal Protection and Due Process Rights under

the Fourteenth Amendment to the Constitution of the United States.

VII.

Your Respondent would show that it is crucial that the Court rule immediately, with shortened time for response, because the suspension date is rapidly approaching. In order to help expedite this matter Respondent agrees to a telephone presentation of this Motion by telephone conference call between the Court, counsel for the State Bar and himself.

WHEREFORE, PREMISES CONSIDERED, Respondent prays the Court for the relief requested above.

Respectfully submitted,

/S/
BENTON MUSSLEWHITE
1535 Mellie Esperson Bldg.
815 Walker Ave.
Houston, Texas 77002
713/222-2288
RESPONDENT PRO SE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been forwarded to all counsel of record by placing same in the United States Mail, first class, postage prepaid on this the 11th day of January, 1989.

/S/
BENTON MUSSLEWHITE

App. X-1
[Excerpts]

NO, 14-89-00041-CV

*

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT
AT HOUSTON, TEXAS

*

BENTON MUSSLEWHITE,
Appellant,

versus

THE STATE BAR OF TEXAS,
Appellee.

AMENDED OPPOSITION TO APPELLEE
THE STATE BAR OF TEXAS' MOTION TO EXTEND
TIME TO FILE APPELLEE'S BRIEF AND
RENEWAL OF MOTION UNDER RULE 100(g), T.R.A.P.

TO THE HONORABLE COURT OF APPEALS:

COMES NOW APPELLANT, Benton Musslewhite, and files his amended opposition to the Motion to Extend Time to File Appellee's Brief, filed by the State Bar of Texas, and in support would respectfully show unto this Honorable Court the following:

I.

Appellant's Brief was due on February 17, 1989. Appellant sought, and was granted, an extension of time to file such Brief, to and

through March 1, 1989, and the Court extended the time to and through March 6, 1989. Appellant's Brief was duly filed on such date, March 6. Thus, Appellant was granted an extension of time of a total of seventeen (17) days. Moreover, it is pertinent to note that Appellant's suspension commenced on January 31, 1989. Thus, the 90-day suspension referred to in the Agreed Judgment entered into between Appellant and the State Bar will be completed on May 1, 1989.

II.

The Appellee's Brief should be due on March 31, 1989. Now Appellee seeks an extension to and through May 30, 1989. This request is astounding, unjust and manifests a calloused indifference to the rights of members and former members of the State Bar of Texas.

***

IV.

Now, in the "unkindest cut of all", the State Bar, after spending thousands of dollars investigating and prosecuting the

Appellant, including the fruitless trip to Scotland, claims that it does not have enough money to hire sufficient attorneys to handle the appeal in a timely manner, so that, it claims, it must have sixty (60) extra days in which to prepare and file its Brief. What is so shockingly calloused about this request is that Appellee knows that the 90-day suspension period Appellant would have been required to accept, had it not been for the unjust revocation, will be completed on May 1, 1989 (90 days from January 31, 1989); the Appellee vigorously opposed all efforts of Appellant to have the district court defer suspension pending appeal on the merits; and now it indifferently seeks an extension that will carry the suspension at least thirty (30) days beyond the Agreed Judgment 90-day period (and obviously many days more because the oral argument wil have to be set after May 30th and then time thereafter will be needed for the Court to render its judgment). Since the Appellant will eventually win the appeal, the State Bar, by claiming to have an

inadequate staffed General Counsel's office, will, should this Court grant its requested extension, have been able to unjustly inflict upon the Appellant an additional 30 to 60 days of suspension, with devastating effect upon Appellant.

V.

Appellant, therefore, takes the following positions:

1. If the Appellee will agree, and work with Appellant, to procure an order of the district court or this Court (under Rule 49(b)) allowing supersedeas of the suspension provisions of Judge Casseb's Judgment Revoking Probation with the supersedeas to take effect on May 1, 1989 (which would be the end of the 90-day period of suspension that Appellant was required to serve even if he wins the appeal and the revocation is nullified), then Appellant has no objection to the Court granting the full extensin of 60 days requested by the Appellee.

2. But, absent such an agreement and

order (to grant Appellant supersedeas effective May 31, 1989), Appellant strenuously objects to the granting of any extension of time for Appellee in which to file its Brief which is in excess of the same period of time for which Appellant was given extension, namely 17 days.

VI.

The Appellee fails to state adequate and sufficient grounds for a 60-day extension (unless Appellee agrees to a supersedeas effective May 31, 1989), particularly in view of the fact that, should this Court grant the 60-day extension, the Appellant will suffer severe, irreparable harm beginning May 1, 1989, and in view of the further fact that the State Bar in this case, like the State of Texas in a criminal case, has the duty to exercise fairness and diligence toward those it prosecutes. The Appellee's Motion for Extension of Time demonstrates both a lack of fairness and lack of diligence. Why should Appellant be penalized with additional and unjust suspension time simply because the

State Bar, which found it had no shortage of money with which to investigate, persecute and harass the Appellant, now claims that it does not have sufficient staff with which to handle this appeal in a timely manner? Therefore, Appellant requests the Court to deny the Motion for Extension of Time of Appellee, except on the conditions stated under para. V. above.

VII.

Regardless of how the Court rules on the Appellee's Motion for Extension of Time, Appellant renews his request that the Court, pursuant to Rule 100(g), T.R.A.P., accelerate and advance this case upon the Court's docket for oral argument. Needless to say, every day that goes by after May 1, 1989, causes compounding, geometrically progressive harm to Appellant because of the suspension during this appeal. Therefore, time is of the essence and just cause exists for advancing this case upon the docket for Oral Argument in accordance with Rule 100(g).

WHEREFORE, PREMISES CONSIDERED, Appellant prays the Court to deny Appellee's Motion to Extend Time to File Appellee's Brief, except on the terms and conditions stated in para. V. above, and to advance this case upon the docket for Oral Argument.

Respectfully submitted,

/s/
Benton Musslewhite PRO SE
1535 Mellie Esperson Bldg.
815 Walker Avenue
Houston, Texas 77002
713/222-2288

APP. X-2

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

March 30, 1989

Hon. Benton Musslewhite
1535 Mellie Esperson
815 Walker
Houston, TX 77002

Hon. Linda Acevedo
State Bar of Texas
P. O. Box 12487
Capitol Station
Austin, TX 78711

RE: CASE NO. 14-89-00041-CV
TRIAL COURT CASE NO. 86-44452

STYLE: Musslewthie, Benton v.
The State Bar of Texas

Counsel:

Please be advised that on this date the Court GRANTED appellant's motion to extend time to file brief in the above cause; time extended to and including May 15, 1989 at noon.

Respectfully yours,

MARY JANE SMART, CLERK

By Charlene Mitchell
Deputy

App. Y
[Excerpts]

NO. 14-89-00041-CV

*

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT
AT HOUSTON, TEXAS

*

BENTON MUSSLEWHITE,
Appellant,

versus

THE STATE BAR OF TEXAS,
Appellee.

*

MOTION PURSUANT TO RULE 49(b) OF THE TEXAS RULES OF APPELLATE PROCEDURE FOR IMMEDIATE APPELLATE REVIEW OF THE DENIAL BY THE DISTRICT COURT OF APPELLANT'S RULE 47 MOTION REGARDING THE SETTING OF SECURITY FOR THE PURPOSES OF SUPERSEDEAS; A FURTHER MOTION FOR A TEMPORARY RESTRAINING ORDER, WITHOUT NOTICE, PENDING HEARING ON RULE 49(b) MOTION; AND APPELLANT'S MOTION FOR ACCELERATED APPEAL, SHORTENING OF TIME FOR FILING BRIEFS AND ADVANCEMENT OF CASE ON DOCKET FOR ARGUMENT, PURSUANT TO RULE 42(b), 74(n) AND 77(b)(6) OF THE TEXAS RULES OF APPELLATE PROCEDURE

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS OF THE FOURTEENTH SUPREME JUDICIAL DISTRICT:

COMES NOW BENTON MUSSLEWHITE, Appellant,

and moves the Court pursuant to Rule 49(b) of the Texas Rules of Appellate Procedure, to reverse the denial by the District Court of the Appellant's Rule 47 Motion, order that the District Court set security for supersedeas and mandate that, upon deposit of such security, the District Court order the District Clerk to issue a writ of supersedeas; further, comes the Appellant and moves the Court for a temporary restraining order, temporarily enjoining the enforcement of the suspension provisions of the Judgment of the Court below, pending a hearing upon Appellant's Rule 49(b) Motion; and further the Appellant requests the Court to accelerate the appeal of this case on the merits pursuant to Rule 42(b) of T.R.A.P., shorten the time for filing briefs pursuant to Rule 47(n), T.R.A.P., and advance the case upon the docket for oral argument and submission, pursuant to Rule 77(b)(6) T.R.A.P.; and for such Motions would respectfully show this Honorable Court as follows:

I.

The judgment from which appeal on the merits is being pursued was signed on November 21, 1988. Appeal was perfected in this Court on December 21, 1988. The Statement of Facts was filed January 18, 1989 and the Transcript was filed January 13, 1989. The Appellant's brief is presently due on February 17, 1989. Therefore, this Court has jurisdiction to entertain this Rule 49(b) Motion, submitted pursuant to the Texas Rules of Appellant Procedure.

II.

***

3. Aside from prefecting appeal on the merits to this Court, Appellant filed a Rule 47 Motion (Rule 47, T.R.A.P.) requesting the District Court to set an amount of security deposit so that the Appellant, upon making such deposit, could secure a writ of supersedeas, superseding the suspension portion of the Judgment Revoking Probation. The District Court denied such Motion. The Rule 47 Motion and the District Court's order

denying same are attached hereto as Exhibits B and C. The purpose of this present Motion, filed pursuant to Rule 49(b), T.R.A.P., is to appeal the District Court's denial of the Rule 47 Motion and to request that this Court, after an expedited hearing as provided for in Rule 49(b), reverse the District Court's denial of the Rule 47 Motion; immediately remand the case to the District Court with instructions that the District Court set a security deposit; and mandate further that, upon such deposit being made, the District Court direct the District Clerk to issue a writ of supersedeas, superseding the Judgment Revoking Probation, pending the resolution of the appeal on the merits from that judgment.

4. In the Court below, it is now verified that it was undisputed that the State Bar did not offer any evidence to show that the Appellant was,in accordance with Section 22 of Article X of the State Bar Rules, an immediate and "irreparable threat of harm to his clients or potential clients". Moreover,

it is undisputed that Appellant has never been convicted of a "serious crime", as described in Section 26, Article X of the State Bar Rules. Indeed, the State Bar of Texas stipulated in open Court that it had no objection to the suspension being deferred so that the Appellant could take care of important client business. The Court below found, implicitly, that the Appellant was not "an immediate threat of substantial and irreparable harm to his clients or the public" because the Court, although it entered the Judgment Revoking Probation on November 21, 1988, delayed the activation of the suspension until January 31, 1989 so that the Appellant could take care of important client business. Obviously, the Court would not have done this if the Appellant had been "an immediate and substantial threat of irreparable harm ....

(B) If the Court does not construe Section 24 as asserted under "A" above, then the Court has no choice but to hold Section 24 unconstitutional because it violates the

Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3, 13 and 19 of the Texas Constitution, as written and/or as applied in this case.

Chester J. Antineau, in his Treatise, Modern Constitutional Law, the Individual and Government, states:

> The American Founding Fathers customarily believed in the doctrine of natural rights, and ordinarily included the property right in their listing of such rights. To some the right to own and possess property was not a "prime" natural right but rather a secondary right that society must honor and protect in order to more effectively ensure the basic natural rights to life and liberty.
>
> The United States Constitution and practically all state constitutions provide that a person shall not be deprived of his "property, without due process of law; nor shall private property be taken for public use, without just compensation..."
>
> The federal government, under the Fifth Amendment, and the states, under the Fourteenth, can regulate the use of private property whenever such regulation is reasonable and reasonably related to the public health, safety, morality or general welfare. It is ... unreasonable, arbitrary or capricious interference with the use of property that is unconstitutional.

Id. Vol. 2, Sect. 3:1, at p. 206; emphasis added. See the Fifth Amendment to the United

States Constitution and Article 1, Section 19 of the Texas Constitution.

There is no doubt but that the right and license to practice law constitutes a valuable property right. See *In Re Ruffalo, supra*, and *Sizemore v. State Bar of Dental Examiners, supra*. ....

The question thus arises as to whether or not Section 24 of Article X of the State Bar Rules, whch provides for a blanket suspension of an attorney pending his or her appeal from an order of suspension, is in some way "related to the public health, safety, morality or general welfare" to the extent that it is reasonable and not arbitrary and capricious. The answer to that issue is obvious. If the statute is construed as Judge Casseb has construed it, it provides for a blanket suspension, pending appeal, of all attorneys, regardless of whether or not there has been any showing that the suspension of the attorney in question, pending appeal, is necessary in the interest of the "public health, safety, morality or general welfare".

Another way of putting it, the police power gives the States and their subsidiary entities the right to take property in the exercise of that police power *only* where that exercise is reasonable and in some way related to a police power need - that is the exercise of such power must be such that it will constitute a substantial furtherance of the safety or general welfare of the people. If it does not meet these tests, then the statute is unconstitutional under the Fifth and Fourteenth Amendments, prohibiting the taking of property without due process of law; it violates the Fourteenth Amendment concerning substantive as well as procedural due process; it violates the Fourteenth Amendment concerning "Equal Protection of the Laws"; and it may, since it is a proceeding that is "quasi-criminal" in nature, ***Sizemore, supra***, violate the Eighth Amendment, as made applicable to the states through the Equal Protection and Due Process clauses of the Fourteenth Amendment, prohibiting "excessive bail ... and excessive fines. ....".

As the Supreme Court of the United States made it clear in the recent case of *Shapero*

v. Kentucky Bar Association, 100 L.Ed.2d 475 (1978), a state bar cannot take an attorney's property, namely his license and right to practice law, without violating the Constitution, unless and until such state bar has shown that it has a "substantial governmental interest" in taking such property right and that it is being taken "only through means that directly advance that interest". ....

Whether there is a "substantial governmental interest" in suspending Appellant during a bona fide appeal, or whether there are reasonable grounds for the exercise of the police power to take Appellant's license pending appeal, are "constitutional facts" which must be proven, clearly and precisely, by the party contendig that a particular statute or regulation is constitutional in

the face of a constitutional challenge. See *Antineau*, Vol. 2, at pp. 699-705. As Professor Antineau stated, "the reasonableness of all police power controls under both the Fifth and Fourteenth Amendments" is a matter that must be proven by the party asserting that a "control", such as a statute or regulation, is constitutional. ....

In the Court below the State Bar offered not a scintilla of evidence to establish that the right to suspend an attorney pending appeal, even though such attorney has not been shown to constitute an immediate and irreparable threat of harm to his clients, potential clients and the general public, has any reasonable relationship to "the public health, safety, morality or general welfare" or in any way constitutes a "substantial governmental interest", as defined by the Supreme Court in *Shapero*.

***

IV.

In View Of the Commencement of Suspension on January 31, 1989, We Respectfully Submit

That the Court Should Grant a Temporary Restraining Order Pending the Setting of a Hearing, Conducting the Hearing and the Action of This Court on the Merits of the Rule 49(b) Motion.

Rule 49(b) provides that "the Appellate Court may issue such orders as it finds necessary to preserve the rights of the parties". The Supreme Court of Texas, in ***The State Bar of Texas v. Heard, supra,*** citing ***State v. Rogers***, 165 S.W.2d 81 (Tex.Sup.Ct., 1942), stated that equitable relief is appropriate to correct the action of a trial judge "where he acts in abuse of his discretion, or in violation of his clear duty under the law, and there is no adequate remedy by appeal" 603 S.W.2d at 834. In ***Heard***, the Supreme Court mandamused Judge Wyatt Heard to enter an order suspending the Respondent attorney because he had been convicted of a felony involving moral turpitude. Judge Heard had argued that mandamus, prohibition or injunction was not the proper remedy because the State Bar had

an adequate remedy, namely a regular appeal. However, the Supreme Court rejected Judge Heard's arguments and stated:

"This requirement would effectively repeal Sect. 16(a) of the State Bar Act, however, ***because the question of suspension would be rendered moot once Pruitt's appeal is decided.*** If his appeal was unsuccessful, his federal conviction would be final, and the trial court must disbar him. On the other hand, if Pruitt's appeal is successful and no other grounds exist that would require disbarment, the trial court must restore his license. ***In either case, the dispute over the suspension would be meaningless.***"

603 S.W.2d at 834; (emphasis ours). See also ***State Board of Medical Examiners v. Mann***, 413 S.W.2d 382 (Tex.Sup.Ct. 1967)(affirming issuance of equitable relief directing reissuance of license to practice medicine). Since the Appellant's suspension just commenced on January 31, 1989, in the same vein as the Supreme Court expressed itself in ***State Bar of Texas v. Heard***, this Court should grant a temporary restraining order, without notice, enjoining the enforcement of the suspension provisions of the Judgment Revoking Probation pending the hearing on the merits of the Rule 49(b) Motion. If the Court

does not grant the temporary restraining order, since the suspension just commenced on January 31, 1989, Appellant will suffer irreparable harm, as this Motion now verifies, because if the suspension continues very much longer most clients will be forced to make permanent changes in counsel and Appellant's law practice will be almost completely destroyed. Your Appellant now verifies that irreparable harm will be sustained by him absent the granting of the temporary relief now requested. Appellant will suffer the "day-to-day" harm described in ***Nebraska Press Assn. v. Stuart***, 423 U.S. 1327 (1975)(Blackmun, J., in chambers).

Moreover, as expostulated in ***The State Bar of Texas v. Heard*** and other cases such as ***State Board of Medical Examiners v. Mann***, it is clear that where the issue in question pertains to a matter that will become moot once the appellate process is completed, the only way the appellate court can provide a remedy of law is to enjoin the suspension during the duration of the appeal, so that

the issue can be preserved. This is precisely the purpose of the provision in Rule 49(b) that states that the "appellate court may issue such temporary orders it finds necessary to preserve the rights of the parties". The temporary restraining order we request is necessary in order for this Court to protect its jurisdiction to decide the issues raised in this Rule 49(b) Motion and "preserve the rights of the parties". It is also necessary to prevent irreparable harm.

Therefore, Appellant requests the Court to grant a temporary restraining order without notice, restraining the enforcement of the suspension provisions of the Judgment Revoking Probation, pending the resolution of this Motion on its merits at a hearing to be set "at the earliest possible time" as required by Rule 49(b).

V.

Appellant's Additional Motion for Accelerating the Appeal, Shortening the Time for Filing of Briefs, and Advancing the Case Upon the Docket for Oral Argument.

Pursuant to Rule 42(b), Rule 74(n), Rule 77(b)(6) of T.R.A.P., your Appellant requests the Court to accelerate this appeal in accordance with its discretion to do so; shorten the time for filing briefs, as hereinafter suggested; and advance the case upon the docket for presentation of argument and submission, all as provided by such Rules of Appellate Procedure.

As stated above, the suspension is scheduled to start on January 31, 1989. As further stated above, irreparable harm accumulates day-by-day and on a geometrically progressive basis. If the Court should grant the Rule 49(b) Motion, then this particular Motion will be unncessary. The reason for this Motion and why there is good cause for such Motion is that, if this Court should disagree with us about a proper construction of Section 24 Article X of the State Bar Rules and conclude that such Rule is *not* unconstitutional, and not allow us to supersede the suspension order pending appeal, then, at the very least, there is

good cause for granting this Motion to accelerate the appeal, shorten the time for filing briefs, and advance the case upon the docket for briefing and submission. Surely good cause exists in light of the harsh consequences of Section 24 of Article X of the State Bar Rules which would, should this Court not grant our requested Rule 49(b) relief, stand as a blanket suspension pending appeal even though, as in this case, the attorney in question has not been convicted of a crime of moral turpitude; has a probable chance of winning his appeal and thus vindicating himself on the appeal on the merits; and has not been found to be, pursuant to Section 22 of Article X of the State Bar Rules, an irreparable threat of harm to his clients or to the public.

Therefore, for all of the reasons stated in this Motion, this Motion being verified, Appellant would show that good cause exists for granting relief provided for under Rules 42(b), 74(n), and 77(b)(6) of the Texas Rules of Appellate Procedure. In that connection,

your Appellant hereby respectfully suggests the following schedule in order to expedite this appeal:

(A) Appellant's Brief be due on February 17, 1989, as presently scheduled.

(B) That Appellee's Brief be due on March 9,1989, which is towenty days thereafter.

(C) That the case be set for oral argument at the earliest possible date thereafter.

***

Wherefore, your Appellant prays: (i) That the Court immediately issue a Temporary Restraining Order without Notice, based upon this verified Motion, enjoining the suspension of Appellant's license pending a hearing upon Appellant's Rule 49(b) Motion upon its merits. (ii) That, as required by Rule 49, the Court set an oral hearing upon Appellant's Rule 49(b) Motion, at the "earliest practical date", and that, upon such hearing, the Court grant the rief requested under Rule 49(b), namely that the action of the lower Court, in denying Appellant's Rule 47 Motion with respect to

the setting of security so that Appellant can supersede the Judgment of suspension, be reversed and the District Court ordered to set security and order the Clerk to issue Writ of Supersedeas upon deposit of such security within a reasonable time. And (iii) in the event the Court determines not to grant Rule 49(b) relief, that the Court shorten the time for filing briefs, accelerate the appeal, and advance the case upon the docket for oral argument and submission, all as provided for by Rule 42(b), 74(n), 77(b)(6) of T.R.A.P.

Respectfully submitted,

/s/
Benton Musslewhite PRO SE
1535 Mellie Esperson bldg.
815 Walker Ave.
Houston, Texas
713/222-2288

APPENDIX Z

NO. _____

IN THE SUPREME COURT OF TEXAS

*

BENTON MUSSLEWHITE,

Relator,

versus

THE HONORABLE SOLOMON CASSEB,
Presiding Judge of the
270th Judicial District
Harris County, Texas,

Respondent,

and

THE STATE BAR OF TEXAS,
Real Party in Interest,
Also Respondent.

*

ORIGINAL PROCEEDING, RELATOR'S THIRD PETITION FOR WRIT OF MANDAMUS, PROHIBITION AND/OR INJUNCTION PURSUANT TO RULE 121 T.R.A.P.

TO THE HONORABLE JUSTICES OF SAID COURT:

NOW COMES BENTON MUSSLEWHITE, Relator, complaining of THE HONORABLE SOLOMON CASSEB, Presiding Judge of the 270th

Judicial District of Harris County, Texas, Respondent, and THE STATE BAR OF TEXAS, Real Party-in-Interest, and, for the third time, seeks a Writ of Mandamus, Prohibition and/or Injunction, and for such Petition would respectfully show the Court:

I.

PARTIES

A. The Relator is: Benton Musslewhite, 1535 Mellie Esperson Bldg., 815 Walker Avenue, Houston, Texas 77002, Texas Bar Association No. 14752000.

B. The Primary Respondent is: The Honorable Solomon Casseb, Presiding Judge of the 270th Judicial District Court of Harris County, Texas, 127 East Travis, San Antonio, Texas, 78205.

C. The Real Party-in-Interest is: The State Bar of Texas, State Bar Bldg., Capitol Station, Austin, Texas, 78711.

II.

BRIEF PRELIMINARY EXPLANATION

Relator has sought leave to file a writ of mandamus, etc. on two prior occasions. But the procedural posture of the case was significantly different in both of those instances. The first was presented before Judge Casseb had entered the final Judgment Revoking Probation. The second was presented before Relator presented his motion pursuant to Rule 49(b), T.R.A.P., to the Court of Appeals and before the Court of Appeals had denied the motion. This Petition is being presented after all of the foregoing events have taken place and in a posture wherein all possible remedies below have been fully exhausted....

C. The Record With Respect to the Relator's Efforts to Obtain Supersedeas.

It was undisputed in the district court that the State Bar at no time made any

effort to have the Relator declared an irreparable threat to his clients or potential clients in accordance with the procedure established in Section 22 of Article X of the State Bar Rules. It is further undisputed that Relator has never been convicted of any crime of moral turpitude, which might justify immediate suspension in accordance with Section 26 of Article X of the State Bar Rules. On the contrary, it was undisputed that Relator is not an irreparable threat to his clients or potential clients, as is clearly indicated by the fact that Judge Casseb did not immediately commence suspension in the Judgment Revoking Probation (the Judgment was entered on Novemeber 21, 1988 and suspension did not begin until January 31, 1989). The reason for the deferral was so that the Relator could attend to important client business. Obviously, Judge Casseb would

not have deferred the commencement of suspension if the Relator had been a threat of immediate or irreparable harm to his clients or potential clients. (See cites to Record and discussion under Point Twenty-Two in Exhibit 13).

Furthermore, the State Bar did not offer any evidence in the court below which would establish or tend to establish a governmental interest in having the Relator suspended pending an appeal on the merits in this case. THe record is completely devoid of any evidence even suggesting a police-power reason for suspending Relator pending appeal upon the merits.

In addition, Judge Casseb did not grant an evidentiary hearing at which the State Bar assumed its burden of demonstrating that Section 24 of Article X of the State Bar Rules is constitutional; on the contrary, on the basis of simply a

telephonic hearing, Judge Casseb summarily denied the Rule 47 Motion. Lastly, the Court of Appeals likewise did not grant the Relator a hearing on Relator's Rule 49(b) Motion. The hearing was requested but the Court summarily denied the Rule 49 (b) Motion....

IV.

RELIEF REQUESTED

Relator seeks the following relief:

A. The immediate issuance of a writ of mandamus, mandamusing Judge Casseb to grant Relator's Rule 47 Motion which he has denied, and further mandamusing him: to set a reasonable amount as security for the supersedeas of the Judgment Revoking Probation; to set a reasonable time for Relator to deposit such security; and, upon the deposit of such security within the time allowed, to order the District Clerk to issue a writ of supersedeas, superseding the Judgment

Revoking Probation, pending the prosecution of Relator's appeal on the merits with effect.

B. The forgoing requested relief should be granted for two reasons:

1. Section 24, Article X of the State Bar Rules (Reprinted in Appendix to Texas Government Code, Title 2, Subtitle G, Vernon, 1988), which states that a judgment suspending an attorney shall not be superseded, nevertheless does not preclude superseding the Judgment Revoking Pobation, pending appeal in this case because - when such section is construed in pari materia with Sections 22 and Section 26 of Article X of the State Bar Rules, and construed in the manner that is consistent with traditional rules of construction, including the rule that it should be construed in such a manner as to render it constitutional - Section 24 must be

construed so as to permit the superseding of a Judgment of suspension unless either Section 22 or 26 has been satisfied or complied with or there are other police-power or substantial governmental interest reasons which would justify suspending an attorney pending an appeal which he is probably going to win.

2. If the Court does not construe Section 24 as suggested in 1. above then it has no choice but to hold that Section 24, since it would provide a blanket suspension of attorneys pending appeal regardless of whether or not there existed any police-power or substantial governmental interest reason for doing so, is unconstitutional and violates the Fourteenth Amendment to the Constitution of the United States as well as Sections 13, 15 and/or 19 of

C. Futhermore, as explained in the Summary of Facts above, the Relator is suffering irreparable harm on a day-to-day basis and the longer his suspension goes pending appeal, the more devastating the harm adversely affects him on a geometrically progressive basis. Relator has no adequate remedy at law because, even though he is going to win his appeal and does win his appeal, there is no way he can recover monetary damages in any amount which would make him whole for the harm done him and, even if monetary damages could provide some remedy (which it cannot), there is no defendant against whom he can recover any damages in all probability, because of the law of governmental immunity and qualified immunity. Also important is the fact that Relator has no adequate remedy of law because if this Court does not grant a mandamus, staying the

suspension pending appeal, there is no way that the issue of whether or not Section 24 has been construed properly or is constitutional can be determined as a justiciable issue because it will have become moot upon the completion of appeal, either way the appellate court decides the merits of appeal.

D. Lastly, there is a substantial probability of success on appeal and the questions on appeal present "a fair ground for litigation", therefore justifying an injunction to preserve the issue of supersedeas. There is no question but that Judge Casseb's Judgment Revoking Probation is going to have to be reversed on a number of grounds, all as reflected by the Points of Error listed in the Brief filed in the Court of Appeals (Exh. 13) discussed in the Argument and Authorities below.

E. Thus, all requirements for equitable

relief are present and this case is clearly one that cries out for an immediate mandamus as requested above. In connection with the writ of mandamus, if the Court deems the more appropriate procedural vehicle to be a Writ of Prohibition, prohibiting the enforcement of the suspension provisions of the Judgment Revoking Probation pending appeal and/or a Writ of injunction enjoining the enforcement of the suspension provisions of the Judgment Revoking Probation pending appeal, then Relator requests this Court to employ one of those forms of writ.

F. In the alternative, if the Court does not see fit to grant the Writ of Mandamus, Prohibition or Injunction requested under A through E above, then Relator requests the Court to grant a Writ of Mandamus, Prohibition and/or Injunction mandatorily directing Judge

Casseb to hold a hearing upon Relator's Rule 47 Motion that is compatible with due process - namely a hearing that places the burden upon the State Bar of Texas to produce evidence that either Section 22 or 26 has been complied with or that there is some other valid and justifiable police-power or substantial governmental interest reason for suspending the Relator pending appeal and further directing Judge Casseb that, absent satisfactory evidence of compliance with Sections 22 and 26 and/or proof of some other reason constitutionally justifying suspending Relator's license pending appeal, to grant supersedeas in accordance with Rule 47, T.R.A.P.

G. In the further alternative, if the Court does not grant the relief requested under A through E above, but grants relief under F above, Relator requests

the Court, as an adjunct to the relief under par. F, to grant relief pursuant to Rule 121(c) T.R.A.P., in the form of a temporary prohibition and/or injunction, prohibiting and/or enjoining the suspension provisions of the Judgment Revoking Probation pending the hearing to be conducted by Judge Casseb. For all of the reasons stated under A through E above, should the Court fail to grant the temporary relief sought herein, Relator will suffer irreparable harm and will have no adequate remedy at law....

PRAYER

Relator prays as stated under "Relief Requested" above.

Respectfully submitted,

/S/
BENTON MUSSLEWHITE
1535 Mellie Esperson Bldg.
815 Walker Avenue
Houston, Texas 77002
713/222-2288
PRO SE

AA-1
(Excerpts)

CAUSE NO. 86-44452

STATE BAR OF TEXAS	]	IN THE DISTRICT
	]	COURT OF HARRIS
V.	]	COUNTY, TEXAS
	]	270TH JUDICIAL
BENTON MUSSLEWHITE	]	DISTRICT

STATEMENT OF FACTS

VOLUME IV OF 4 VOLUMES

November 7, 1988

CARMEN W. MILLER, CSR
Official Court Reporter
270th Judicial District Court
Harris County, Texas

BENTON MUSSLEWHITE,
having been called as a witness, after being duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. PINSON:

Q. State your name for the record, please, sir.

A. Benton Musslewhite.

Q. And you're the respondent in this cause; right, sir?

A. Yes.

Q. All right, Describe in your own words to the Court your current financial situation, sir.

A. Well, I personally am in Chapter 7, bankruptcy laws, with the trustee appointed -- counsel represents -- and my --

THE COURT: Pardon me. I thought I was advised that the corporation --

THE WITNESS: Is in Chapter 11, Your Honor.

THE COURT: In Austin?

THE WITNESS: Yes, and my law firm and professional corporation, Law Office of Benton Musslewhite, Incorporated, is also in bankruptcy.

THE COURT: When was the corporation filed in bankruptcy, and when was our personal?

THE WITNESS: Personal was in 1986, I believe, Your Honor, and Law Offices of Benton Musslewhite, Incorporated -- I refer to as LOBM -- was filed for Chapter 11 in middle of 1987, I believe 1987.

***

Q. What precipitated the filing of a Chapter 11 proceeding by LOBM?

A. Basically, the Agent Orange case. When I first got in that -- I'll make it very brief -- I thought it was going to be a monitoring situation. I was hired by Citizen Soldier, with all their people, Veterans Association then in effect for many years. Eventually, I was drawn into being one of the three members of a management committee appointed by Judge Pratt, who preceded Judge Weinstein in the litigation. Then, the three of us expanded the committee with permission of the Court to nine members. By that time, it became apparent I, along with four other lawyers, would be the trial team.

David -- let's see. There were David Dean, Steve Slagle, Tom Henderson, and one other would be the trial team. We got heavily involved on a full-time basis. It was just a gradual acquisition of my time and resources on a full-time basis. That drug on for a long

period of time, as you know, and it just became a financial drain; and then, when Judge Weinstein entered the order for fees which cut everybody substantially from what -- the time they had, even on a time basis -- we had made application on a time basis. It caused all of us, including myself, to sustain over a million, million and a half dollars in losses.

Q. How many dollars, if you know, in actual expenses did you disburse in order to engage yourself - in the Agent Orange litigation?

A. From my office?

Q. Yes, sir.

A. I think it was two hundred something thousand dollars, two hundred thousand-plus.

Q. Have you received any of that money back?

A. Well, fifty of it was awarded, and the four hundred ninety-seven thousand dollars is now in the Registry of the Court in New York.

Q. Do you have any expectaton of recovering any further.

A. Other than four hundred ninety-seven thousand? No.

Q. Right.

A. Yes. Depends on how we fare in the Claims Court of the United States in Sharkey v. U.S. and how we fare in the other litigation.

Q. But that's another lawsuit, right, sir?

A. Those are other lawsuits pertaining to Agent Orange.

Q. I guess my question is: What is -- based on the orders that Judge Weinstein has thus far entered, what sums of money can the Law Offices of Benton Musslewhite reasonably expect to receive back in compensation for your efforts and the expenses advanced?

A. Four hundred ninety-seven thousand dollars total. There will be no more.

Q. And of that, approximately two hundred thousand dollars was expenses?

A. He didn't award two hundred thousand expenses, but we had claimed that much.

Q. All right. Well, why did that particular ruling impact Law Offices of Benton Musslewhite, Inc. so that it had to file under 11?

A. Well, because I had, instead of being able to try and settle other cases -- for example, in the two years after I got out of Agent Orange, I was able to finally get back in the swing of trial, and we got judgments and entered over $30 million in one year. Most of those are still on appeal, so that was not enough; but, basically, for that two to two and a half years, almost three years, I was always involved in Agent Orange; not only am I taking my time spent on the case, but it means I'm not receiving income from other cases and from other matters, although some, of course, settled along the way. It had a tremendously adverse impact on the ability to earn money. It had an adverse impact on the ability to make cases, advances of expenses and trial litigation costs, and it affected my staff. I had to cut back on my staff when I got out of litigation, and it just had an impact that proliferated all the way through my practice.

Q. As a consequence of the economic setbacks from that piece of litigation, were the Law Offices of Benton Musslewhite, Inc. unable to pay their debts as they ordinarily

accrued?

A. It became apparent to me, although I tried for a year after Judge Weinstein cut everybody and cut us down to where we were not awarded our minnmum time on a time basis and cut the expenses, as well, that while other attorneys who had suffered the losses were more able to handle it, I just couldn't handle it. I eventually resolved the matter by simply making a decision to file for Chapter 11.

***

Q. All right, sir. How many children do you have, Mr. Musslewhite?

A. I have seven.

Q. What are their ages?

A. Three are grown and four are small.

Q. How old are they?

A. Seven, ten, twelve and thirteen.

Q. Are they all attending school here in Houston?

A. Yes, they are.

Q. Harris County? All right, sir. And they are all the children of your current wife; is that correct?

A. Correct.

Q. You and your current wife?

A. Correct.

***

Q. Have you commenced making efforts to refer those cases out prior to your anticipated period of suspension?

A. I'm sorry. Yes, I have. Absolutely.

Q. All right. Have you had any success?

A. Yes, I have to some extent. There's still some that I have not been able to refer out.

Q. How many?

A. Probably 25 so far, as of this time.

Q. Of that 25, in your estimation, how many do you believe you will be ultimately successful in referring out?

A. I think, that's a number between 20 and 25, which we discussed with Mr. Hamilton previously, the number that I'm not going to be able to refer out.

Q. And why? Tell the Court.

A. I'm not saying that's absolute, but the way it looks now.

Q. Well, tell the Court why you do not blieve you will be abnle to refer those cases out.

A. Well, they're just more difficult cases in terms of liability issue and they are not easy cases; and the damages in those cases are not sufficient to justify in the mind of a lot of lawyers, I suspect, the hard battle of liability.

Q. All right, sir. So, what -- what, if you know, will transpire in the event that you are suspended, in the event you are unable to refer those cases out?

A. I probably will have to withdraw. Of course, I'll have to withdraw, no question about it. That would be required as part of the procedure that we've discussed last week.

***

Q. All right, sir.

Now, let's talk about the Reese case. What is the latest information with respect to the probability of going to trial on the Reese case?

A. It is going to trial; had a hearing on it last Monday, and it is going to trial on November 28.

Q. All right, sir. And, in the event that it's going to tria on November 28, when can you reasonably anticipate that it will be wound up?

A. Well, we told the Court, at the outside, three weeks. We also estimated that we might be able to try it in two weeks, but since we have no control over the number of witnesses and they've listed a long number of witnesses -- the defendants have over 20 employees that they may call to the stand, as well as their experts and so forth -- I suspect three weeks is more likely the amount of time that will be needed.

Q. Two to three weeks, three weeks at the outside?

A. Three weeks at the outside. I'm hopeful. I've seen cases last a lot longer. Lawyers go beyond the estimate, but that's the best estimate I can give the Court now.

Q. So, we'd be talking about approximately December 7, December 20, to wrap that up?

A. Correct.

Q. All right, sir.

Mr. Musslewhite, do you have -- do you presently have any means of earning a living other than the practice of law?

A. No.

Q. Does your wife?

A. No.

***

THE WITNESS: Your Honor, I had one area I wanted to cover, if I could do it by statement.

Two things, on the Reese case, I talked again, talked with Broadus and talked with the client, and the client still has asked that I be allowed to try the case with Mr. Spivey because of the fact I've been in it during the entire time it's been on file, almost or soon after it was filed, and he wants me to try it along with Broadus Spivey; and, secondly, on the -- I haven't had a chance to say to the Court that I have gone through every Bar Jornal, but I have to the extent that the underlying causes of action are relevant in the Court's mind for punishment.

There are two cases there. One was the four cases involving Barham, Merit, Jenkins, the travel agency; and I don't know whether the Court recalls, but one of the primary thrusts of those three was the answering, failure to answer telephone calls. I had not realized until recently that -- I'd like to have it marked and offered -- that the Bar put out a brochure that advised that normally that is not grounds for discipline; and, then, also one, if the Court will let us, I'd like to offer two depositions, only depositions taken in that case; and then show -- they demonstrate absolutely no harm befell anyone of those four clients. Travel agency was paid. Mrs. Merit hired another lawyer, and I guess her case is going on all right. Her statute did not run as was alleged. On the Barham case --

***

THE WITNESS: Well, along that line, I don't know what the Court's -- in the Court's mind about determining what is proper for revocation, whether you spring from the original or not, but to the extent the Court might do that, that's why I offer it, Your Honor; and Mrs. Barham, her case was settled to her satisfaction, proved up in the court with a guardian ad litem while I was still attorney; and Mrs. Jenkins, if she wanted to, she could have her file back. Basically, that case turned on miscommunication, which is also mentioned in this exhibit. And, when you look at this exhibit, read the complaint and read the deposition, Your Honor, you come up with a feeling that this must be the only case in history of the Bar Association, only one I can find so far where they've attempted to disbar an attorney for the kind of things they've alleged.

Now, the other case was solicitation and fee splitting. I've also denied the solicitation. I would call the Court's attention to the fact the Supreme Court of Texas is now deciding whether or not provisions under which they charged me in that case are constitutional; and, certainly, I'm sure the Court would understand (the impact on this case if) in the O'Quinn case they are held unconstitutional. We will ask the Court to void the agreed judgment because it would be based on unconstitutional sectons under disciplinary rules and Bar rules.

Two, it was undisputed. Two of the people they named in that as so-called runners I never met before. Three were clients. Two -- one was a head of the Veterans Association that had been in business long before I ever met (him, representing) Agent Orange people.

***

THE WITNESS: I'll try to make it short, Your Honor.

There never really was in my mind a case there, and you recall, Judge, that when they agreed to consolidate, that that case, the other cases -- and they came up for trial on

November 1987 -- the Bar said they weren't going to be ready to go on the so-called solicitation case and asked for severance -- after they agreed to consolidate, asked for severance, (and a continuance was) granted by the Court .... Your Honor, I've always conceded as to the last allegation in the second cae, the fee splitting with lawyers, that some of the arrangements I have with Mr. O'Quinn and other lawyers called for the splitting of fees on cases in which it was not anticipated they would be doing any work.

As I now read the disciplinary rules, that could be a violation. I've always conceded that, but I just submit to the Court that the extent of that, if it is a violation, was no one was hurt. No one was injured. It was in good faith.

Now, when we get to the grounds for revocation, I'm not going to repeat all the testimony. The Court's heard it. But I do say this to this Court that when I went to Scotland, I did not believe that I would be receiving any cases and in the event that I would be called upon to discuss that matter, as I testified, and nobody contradicted, I had arranged to refer those cases to Mr. O'Quinn, and he had agreed to accept them. I believe that what was going to happen is what has happened, and that is we would go over and give some free advice which I don't mind doing. I've done it many times in the past, and that advice might help them in settling the cases. As a matter of fact, I've been advised now that settlement offers in Scotland are up over a million dollars a family for the average family, wife and children. At the time I went over there, they were 120,000 pounds maximum. Some of the solicitors were trying to arrange a settlement as a package for all of them for that amount. ... -- I can say without being conceited about it, but I'll just lay it on the line with this Court, that what I did over there has ended up helping to some extent, I think (it) created a climate for a higher level of negotiation. It's undisputed

that nobody got hurt in that situation. I never talked, as Mr. Smoot admitted on the stand, to a single victim. Never intended to and no victim was ever misled; nothing ever happened. It's undisputed, based on the records before this Court, that the solicitors that we talked to, when the matter of employment came up, they were fully advised of my situation with the Bar Association so that they were not in any way misled; so that -- I have to say this in all candor, Your Honor, to me, that whole situation is much ado about nothing. I know the Court may not agree with me on that. I do say this: I don't think there's anybody (who) can question (what we did) by reading Shapiro and (by reason of the fact that I made) it clear in everything that I did that we would talk only to ... solicitors and not to victims and we never talked to victims and only talked to solicitors. ...

As to the Hartman matter, that's in a sense a tragic thing. ... I've got two firms willing, either one of which is willing to accept the case if I'm permitted to accept the case, that will carry that case forward; and it's really a good case based upon present medical science. It involves a non-Hodgkins disease lymphoma, and there's been two studies since we settled the Agent Orange case in New York against chemical companies which shows those are related to Dioxin exposure and medical science is good. Tragically, it's such a complicated can of worms and Judge Weinstein's actions on fees created such a chill effect that it's hard to get lawyers to get involved in Agent Orange. I submit in the interest of this country and in the interest of the veterans of this country, to the extent this Court is willing to let me, that I be allowed to participate in those cases because they're that important. They're that important to a group of people that served our country with honor, and they were poisoned and they're dying a little bit a day at a time. It's only fair that they have their day in court and I'm the only lawyer of all the members of the former

management team ... that (his) continued to battle for their day in court, either in Claims Court of the United States (or) in ... -- this new phase of the actions, and any other aspect of the actions, but -- so I submit that in mitigation and I say to you, Your Honor, ... -- I have a hard time understanding how I can be disciplined and suspended for a substantial period of time for referring a case in the manner in which the undisputed evidence before this Court, by two prominent members of the Bar, Mr. Spivey and Mr. Hogan, said all plaintiff lawyers (should)refer those cases. I did it, and the (agreed) judgment, I call the attention to the Court, does not tell me differently, and I did it as I thought wa proper; and the minute I heard there was a problem with it, I told Mr. Hartley Hampton, who's sitting there. I was glad to hear that he and I and Mr. Smoot were going to get together and clarify, because I thought I was doing it right. If there was any question, I wanted to do it as Mr. Smoot thought I ought to do it.

Unfortunately, that meeting didn't come about before they filed a motion to revoke me. (Mr. Smoot cancelled the meeting). Mr. Smoot never asked at that time -- called Mr. Hampton, said, "Let's get another meeting, try to work that out." Had the judgment said that I can't first sign a client on a power attorney before I refer it, if it said that, I wouldn't have done it, Your Honor. I say that under my oath. So I suggest and submit respectfully to this Court, ... that nobody has been hurt by anything I've done. Nobody's been harmed. There have been some benefits from what I've done, as I've testified to here, and I did everything in good faith; and to suspend me for three years for all of this, springing from the earlier to the present, to me, Your Honor, I respectfully say to the Court I don't feel it's fair. I feel it's selective prosecution. I don't think the Court can go through the Bar Journal, and I've been through (it) to a certain extent -- I here now swear I've never seen any case in the Bar

Journals that comes anywhere close to this kind of punishment for the things that they're talking about. I can't find anybody that's been punished for most of these things. But, ... in summary, Your Honor, I respectfully ask the Court to consider, if it is going to find that there's been a violation of the agreed judgment, that the amount of punishment be far less than what the Court has indicated in its letter, and I would like to offer that as an exhibit, and that's all I have to say.

DIRECT EXAMINATION (continued)

BY MR. PINSON:

Q. One question, Mr. Musslewhite; with respect to the Hartman case, which was one of the two prongs of the allegations in the motion to revoke your probation here, are you telling the Court that, if you are suspended, that the Hartmans will not have a lawyer to represent them?

A. Well, the two firms that I have talked to, that indicate once I find out how it's to be done that they would take the case on, wanted me to be involved because the key is military contractor's defense. I handled that part of the Agent Orange litigation in New York, and they just don't want to have to go in and read 250 depositions that were taken on that one defense alone, 250-plus. They don't want to have to do that. I've done it and pretty much have it all in my mind, and I've participated in it, and that's why they wanted me to be involved. They're willing to be lead counsel, finance (the) litigation and case manage it in their office as I understood the provisions require; and, again, I respectfully submit to the Court and to you, Mr. Pinson, that that's not a new case, anyway. The Hartman case is part of the ongoing Sharkey litigation, but, nevertheless, if the Court believes it is a new case, I think it's important that somehow or another, for the sake of these people and

there are a number of cases waiting to join that case that involve soft tissue sarcoma and non-Hodgkins disease lymphoma, both of which medical science supports.

Q. Well, let me ask you another way. How, in the event of suspension by you, how are the Hartmans' interest, your clients' interest, going to be protected?

A. I don't know that anybody will go forward with those cases -- and there's about 20 of them in that category -- that will go forward with those cases for our Vietnam veterans if the Court does not allow me somehow to handle those cases. That's my opinion at this time. It could be different.

App. AA-2

NO. 86-044452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	]	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	]	270TH JUDICIAL DISTRICT
BENTON MUSSLEWHITE	]	

NO. 87-244402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	]	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	]	151ST JUDICIAL DISTRICT
BENTON MUSSLEWHITE	]	

AMENDED MOTION TO DEFER IMPOSITION OF NINETY-DAY ACTUAL SUSPENSION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW BENTON MUSSLEWTHIE, Respondent in the above styled and numbered causes, and moves the Court to defer the time for the ninety-day actual suspension period and for such Motion would respectfully show:

I.

The Agreed Judgment in this cause reflects that, upon proper motion by the Respondent, this Court has the discretion to defer the imposition of the ninety-day actual suspension period to a time frame no later than August 31, 1989. The present time period

scheduled in the Agreed Judgment, should the Court not exercise its discretion to defer, is November 1, 1988 to and through January 31, 1989. ....

II.

This deferral is sought for good and sufficient reasons:

1. There are a number of settings and necessary discovery undertakings which have been scheduled during November, December and January and because of those settings it would be, insofar as the clients are concerned, in their best interests to have the actual suspension period postponed until the summer of 1989. These include: **Reese vs. Pedernales Electric Cooperative, et al**, Cause No. 85-068-C in the 26th Judicial District Court, Travis County, Texas, (this case, originally scheduled for trial, by preferential setting, on October 10, 1988, has, because of life-threatening illness of a family member of Defendant's counsel, Mr. John Coats, been recessed until October 24, 1988 and the trial will require two weeks,

possibly more, to complete and the case will thus continue past November 1, 1988; this is a serious case involving a paraplegic and the case has been pending over three years; for harship reasons, including expiration of medical insurance, the client needs to have the case tried as soon as possible; it would certainly be harmful to the interests of the client to postpone the case and would, as the client will verify, be harmful to the client if (he) were deprived of the counsel of the Respondent, whom the client has insisted try the case along with Broadus Spivey); Gloria Chaplin, et al vs. Exxon Corporation, et al, Cause No. 84-68849 in the 61st Judicial District Court of Harris County, Texas (this case involves the Liberty Waste Dumpsite and it has always been the desire of the clients that the undersigned counsel be one of the lawyers to actually try the case; the case has been set for trial for October 17, 1988 but very possibly will be reset to a later date, in December, 1988 or January, 1989, because of the need to complete discovery and

to take care of other pretrial matters; this case is an extremely important one and the first trial involves five Plaintiffs who live near the dumpsite and suffered property losses as well as personal injuries); **Lovelace Soirez, et al vs. Dunn Equipment, Inc., et al**; Cause No. 85-F-2973; In the 149th Judicial District Court of Brazoria County, Texas (this case is now scheduled for trial for the first two weeks of November 1988; the Respondent has promised Plaintiffs that he would try this case; the trial at that time is urgent because of the deteriorating health of the Plaintiff; this case is a serious case, involving serious brain injuries, and needs to be tried as soon as possible; see letter of Robert Binstock, who has been case managing the file on behalf of Plaintiffs, and who confirms the above, attached as Exhibit A); **Paula Emmert (Moore) vs. Harris County Hospital District and Ben Taub General Hospital**; Cause No. 83-15168; IN the 152nd Judicial District of Harris County, Texas (this case is set for trial on January

2, 1989, it is an old case which must be tried or be subject to dismissal for want of prosecution, the client wants Respondent to try the case and the case probably will not settle). It should be noted that the Peel case, which was mentioned in the original Motion to Defer, has now been settled and the depositions in the Far East in the Grunke, et al case are being changed to March of 1989. There are other cases which are set for trial during the three-month period, of November 1, 1988 to January 31, 1989 but the foregoing cases are the most important ones and which create good cause for postponing the actual suspension period from November, 1988 - January, 1989 to June, 1989 - August, 1989.

***

Respectfully submitted

/s/

THEO W. PINSON
GREENWOOD, KOBY, OLD,
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1900 Wortham Tower
2727 Allen Parkway
Houston, Texas 77019

ATTORNEY FOR RESPONDENT

APP. AA-3
[Excerpts]

NO. 14-89-00041-CV

*

COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT
HOUSTON, TEXAS

*

BENTON MUSSLEWHITE, APPELLANT

VS.

THE STATE BAR OF TEXAS, APPELLEE

*

On Appeal From the 270th Judicial District
Court of Harris County, Texas

*

BRIEF FOR APPELLEE STATE BAR OF TEXAS

Respectfully submitted,

Steven D. Peterson
General Counsel

Linda A Acevedo
Assistant General Counsel

State Bar of Texas
Office of the General Counsel
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***

Musslewhite also argues that the trial court should have granted his request for supersedeas pursuant to Rule 47, Tex.R.App.P., which provides in part:

> Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk. ... (Emphasis added).

Art. X, Sec. 24, State Bar Rules, provides as follows:

> Either party to a disciplinary action shall have the right of appeal to the Court of Appeals but, if the judgment appealed from be one suspending or disbarring the respondent, he or she shall not be entitled to practice law in any form while the appeal is pending and shall have no right to supersede the judgment by bond or otherwise. (Emphasis added).

Musslewhite argues that either (a) Section 24 should be read in conjunction with Sections 22 and 26 of the State Bar Rules or (b) Section 24 is unconstitutional.

His first argument is based on some theory that the meaning of Section 24 is not clear. Section 24 is clear, unambiguous, compulsory, and constitutional. The rule

simply provides that lawyers, such as Musslewhite, may not practice law pending appeal of their suspension or disbarment. This statute specifically addresses the status of a lawyer who has been suspended from the practice of law during pendency of the appeal. No discretion to override this statute is granted to any court. Thus Judge Casseb was correct in denying Musslewhite's motion. Judge Casseb not only had no duty to permit Musslewhite under any terms to secure a stay of his suspension, Section 24 clearly establishes that Musslewhite has no right to practice pending appeal. Judge Casseb did not even have any discretion to abuse.

Musslewhite contends that to establish the meaning of Section 24, it must be read along with Section 22. Section 22 by its very terms had nothing to do with an attorney subject to a trial court's final order of suspension or disbarment. Secton 22 permits an immediate interim suspension, similar to a temporary injunction "pending the final disposition of a disciplinary action ...." A

Section 22 interim suspension protects the public during the course of a grievance matter against a lawyer found to be an immediate threat to the public, whereas Section 24 protects the public from a lawyer suspended or disbarred after trial.

The rules cannot mandate Section 24 be construed in pari materia with sections 22 and 26. Lawyers are suspended and disbarred for reasons other than conviction or threats to the public. In fact, most lawyers are suspended and disbarred for reasons other than having been convicted or because they are threats to society. Thus, Section 24 specifically contemplates those lawyers who are suspended and disbarred for reasons other than constituting irreparable harm and/or being a convicted felon.

In addition, Section 22 provides a mechanism for suspension throughout the process when the lawyer is shown to be an imminent threat to the public. Likewise, Section 26 provides its own mechanism for dealing with lawyers who are appealing their

criminal convictions and mandates that they be suspended while doing so.

Thus, Section 24 not only covers the above-mentioned situations but also all other situations in which lawyers have been suspended and disbarred. There is absolutely no implied conflict between these sections.

Musslewhite argues that if one does not read the sections together then Section 24 must be unconstitutional. ....

More importantly, when dealing with attorney discipline, the primary concern is protection of th public. Lack of public confidence in the integrity of the bar overrides any policy that would permit an attorney who has been duly found by a tria court of competent jurisdiction to have committed professional misconduct to continue tc practice law pending appeal of their suspension or disbarment.

***

Thus, Musslewhite has no constitutional right supersede the suspension order pending exhaustion of appeal. The no supersedeas rule

is analogous to a lawyer being suspended by operation of law pending appeal of a criminal conviction for a serious crime. In both instances, the lawyer may eventually secure appellate reversal and therefore practice law again, but the confidence of the public and the bar compels that lawyers convicted of serious crimes, and lawyers suspended or disbarred after trial of a disciplinary action, must be suspended pending appeal.

> The practice of law is a license, not a right, and only persons of good moral character and fitness are permitted to practice law in the courts of this state. An attorney who is convicted of the enumerated crimes cannot hold the confidence of the public or the profession as long as the conviction stands.

State Bar of Texas v. Heard, 603 S.W.2d 829, 834 (Tex. 1980). Musslewhite is in no better position. In fact, should Musslewhite be permitted to practice pending appeal, and should appeal eventually favor the State Bar, at the Texas Court of Appeals, the Supreme Court of Texas, and/or the United States Supreme Court, Musslewhite may effectively avoid most of his suspension.

Musslewhite's attempt to analogize his situation with that of Texaco/Pennzoil is misplaced. The Second Circuit case dealt with the essential elements necessary in bringing a 1983 action. In addition, the issue in *Texaco* was that of a denial of a fair opportunity to obtain an adjudication on the merits of an appeal. In Texaco, the posting of the bond would have destroyed the entity itself. Here Musslewhite retains every opportunity to appeal his case and every opportunity to continue to earn a living - albeit not in the field of law. If the judgment to revoke is reversed,the sole harm to Musslewhite is the deprivation of his privilege to practice law or its monetary equivalent. His complaint is nothing more than that of loss of economic earning power.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES, ARGUMENTS, AND AUTHORITIES CONSIDERED, Appellee prays the judgment of the trial court be affirmed in all respects.

Respectfully submitted,

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Austin, Texas 78711

/s/
Steven D. Peterson
State Bar Card No. 15842000

/s/
Linda A. Acevedo
State Bar Card No. 00829825

ATTORNEYS FOR APPELLEE

THE STATE OF TEXAS]
]
COUNTY OF HARRIS]

BEFORE ME the undersigned authority appeared GLORIA CHAPLIN, known to me to be the person whose name is subscribed hereto, and after first being duly sworn did upon his oath state, swear and affirm as follows, to-wit:

"My name is Gloria Chaplin. I am one of the leading plaintiffs in the case of Eva Fontenot v. C.P. Joiner, et al, Cause No. 84-68849, pending in the 161st Judicial District Court of Harris County, Texas. In 1984, I hired Benton Musslewhite as my attorney to represent me and other people who live near the Liberty Waste Dumpsite to sue the companies that had deposited toxic waste in that dumpsite, created a nuisance, caused me injuries and caused me to sustain property damages. I had heard and had read about the work Benton had done in connection with that lawsuit (the Agent Orange lawsuit). The impression I got was that he had been willing to stick with the case no matter how long or difficult or complicated it had been. I recommended to all my neighbors that they hire Benton also and I believe over a hundred people signed up with Benton. He later brought into the litigation John O'Quinn, Joe Jamail, Wayne Fisher, Bill Edwards and Hill & Parker. They stayed in the case for approximately nine months and then pulled out. They indicated to me that, while they thought the case had some merit, they could probably spend their time and money on better cases that would not be so difficult - the

implication was that they felt that they could make more money handling other litigation than this case. Benton then got Dennis Reich to work with us on the case and he in turn, through some contacts of ours, brought Don Maierson, Tom Pearson and their offices into the case. I always knew that Benton was not in the financial position to finance the case, nor was Dennis or Don Maierson or Tom Pearson. Benton and I then persuaded John O'Quinn to come back into the case, finance the case and consult with us on it and he agreed to do that, with the understanding that he would not be expected to try the case. I had always wanted Benton Musslewhite or John O'Quinn to try my case. They were my first choice. Part of the reason John O'Quinn could not try the case was that he was having to spend so much time trying to defend himself against the State Bar Association. But that did not bother me too much because I knew Benton could try the case and I had a lot of confidence in him as a trial lawyer. I had read about some of his victories in the courtroom and so I and all of my friends who hired Benton and who live around the Liberty Waste dumpsite were looking forward to him trying the case.

Then the Bar got after Benton. I just cannot believe how vicious they were. They called and asked me to come down to testify against Benton and told me not to bring Benton with me. He was my lawyer and I wanted him to come. I asked Benton about that and he simply said that, since I did not have anything to hide, and there was nothing wrong about the way I and my neighbors had employed him, that I should go on down and just lay all the cards on the table. So I and Eva Fontenot went down to the Grievance Committee.

I was shocked at their attitude - they were so hostile, aggressive and critical of Benton and John O'Quinn. The greatest shock of all was when Eva and I finally found out that one of the members of the Grievance Committee was

law firm who represents Exxon in my case and who representes most of the other defendants. This person was whispering to other people to ask questions and some of the questions, as far as I could recall, pertained to the merits of the case. I later reported this to Benton and he was very upset about it. Eva Fontenot and I discussed it later and we got more and more upset the more we thought about it so we filed a grievance. We filed a grievance against the Committee 4-C for doing what they did to me and Eva which was totally improper, highly unethical and just downright rude. To this date I have heard nothing more about the grievance. Eva and I have talked about it on repeated occasions and even talked about filing suit against the State Bar. We may still do that.

Judge Casseb eventually suspended Benton for three years. I testified in his Court, and maybe I am wrong, but it seemed to me that everything was so cut and dried when I was down there. I was rushed on the stand and rushed off and did not get to really say what I wanted to say. In any event I made it clear to Judge Casseb that I wanted Benton to try my case and asked him not to commence the suspension of Benton until after the case was tried. This was in November of 1988 when I was before him and the case was set for trial for May of 1989. Other plaintiffs were asking Judge Casseb to defer the suspension so Benton could try their cases too. Judge Casseb finally did defer the suspension so that Benton could try a case over in Austin. I cannot recall the name of the case but it involved a paraplegic. But Judge Casseb refused to defer the suspension long enough for Benton to try our case.

This really upset me. I really do not think much of the State Bar Association, particularly the way they do not seem to care about the rights of people that lawyers are supposed to represent and protect. In any event, I was then deprived of the two

attorneys that I had wanted as my first choice lawyers, Benton Musslewhite and John O'Quinn. Therefore, I had to go to court with the other lawyers. I want to say this: I am not in any way casting aspersions on the efforts made by the lawyers who tried my case. Don Maierson, Tom Pearson, Dennis Reich and Stephenie Shapiro were all in the courtroom working on my behalf and Benton did a lot of paralegal work out of the courtroom. We were fortunate in that we got a million dollar verdict for the three of us whose cases were being tried, (myself, Eva Fontenot and Fannie Cook). And I want to say that I could tell that all the lawyers who were there trying my case in the courtroom, Mr. Maierson, Mr. Pearson, Mr. Reich and Ms. Shapiro were working hard and doing their very best. I have nothing but appreciation for the work that they did for me. But, I believed then, and still believe now, that Benton could have gotten me a greater recovery. He has gotten many million dollar recoveries and settlements and he had the experience.

There is something seriously wrong in this country when a state bar association can do what they have done to Benton Musslewhite. I know Benton and I have gotten to know how he operates. I believe I have been around him in his office enough to be able to say that he has always gotten his cases from proper sources, people that know him; people that have read about him; people who are in organizations that have used him before; other attorneys and former clients. I just think they wanted to sacrifice Benton and that is what they did. I am very upset about it and, most of all I am upset because, although I thought I lived in the greatest country in the world, I was not given the right to have the lawyer of my choice to represent me because of what the Bar Association that is supposed to protect my interests, did to me."

/s/

GLORIA CHAPLIN

SUBSCRIBED AND SWORN TO BEFORE ME ON THIS THE 7th DAY OF SEPTEMBER, 1989.

/s/

Notary Public in and for
Harris County, T E X A S

My commission expires:
10/19/92

App. BB-2
[Excerpts]

GLORIA CHAPLIN,

having been called as a witness, after being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PINSON:

Q. State your name, please, ma'am.

A. Gloria Chaplin.

Q. Where do you live, Ms. Chaplin?

A. 109 Mizel, Highlands, Texas.

Q. How are you employed?

A. I'm not at this time except for selling Avon.

Q. Ms. Chaplin, do you know the respondent, Benton Musslewhite?

A. Yes, sir.

Q. How long have you known him?

A. Since May, 1984.

Q. Is he your lawyer in a particular case?

A. Yes, sir, in the Liberty Waste Dumpsite case. He's supposed to be my trial attorney.

Q. Okay. Are you a plaintiff or one of a group of plaintiffs?

A. One of a hundred families.

Q. Is this case pending in State or Federal court.

A. In State court.

Q. Are there any other lawyers involved in the Liberty Waste case?

A. Yes, sir.

Q. Who is that?

A. Tom Pearson, Don Meyerson, Donna Klein, Stephanie Shapiro, John O'Quinn.

Q. And do those folks all represent you and the other hundred families?

A. Yes, they do.

Q. Tell us briefly in your own words what the plaintiffs are claiming in that case.

A. Personal and property damage from the chemical dumpsite.

Q. What chemicals were dumped there and by who, according to the allegations in the complaint?

A. Many chemicals.

Q. Who used this location as a chemical dumpsite?

A. Twenty-two oil companies that I know of.

Q. Ms. Chaplin, how long has that case been pending?

A. Since July 1984.

Q. Has Benton Musslewhite at all times been associated with that case?

A. Yes, sir.

Q. Have you had any difficulty with getting other lawyers to work on that case?

A. Yes, sir.

Q. What kind of difficulties?

A. Well, I've had several attorneys that have taken the case and then backed out.

Q. Did that happen on more than one occasion?

A. Yes, I believe there's six or seven attorneys that have dropped our case.

Q. Has Mr. Musslewhite? Was that prior to Mr. Musslewhite's involvement?

A. No.

Q. How was the work divided up between Mr. Musslewhite and the folks that dropped out of the case?

A. They all had separate parts to do. I don't know how it was divided up.

Q. Okay. At any rate, as a result of those other people dropping out, did Mr. Musslewhite assume a larger responsibility for the case?

A. Yes, sir.

Q. That is, of your own kowledge, do you know whether he had to do more work as a result of these other folks dropping out?

A. Yes, he has.

Q. Did Mr. Musslewhite ever threaten to drop out?

A. No, sir.

Q. What -- who are you requesting perform the trial work in this particular case?

A. Mr. Musslewhite. He promised me in 1984 that he would be my trial lawyer.

Q. How have your relationships been with Mr. Musslewhite in terms of being able to communicate with thim in this case?

A. Mr. Musslewhite has always called me when I called him. He always returns my calls or has someone from the office, and I've met with im on a monthly basis since I met him.

Q. During the five years that his case has been on file, have you or Mr. Musslewhite received any money by way of compensation or settlement, partial settlement, interim settlement, anything of that nature?

A. No.

Q. Has Mr. Musslewhite continued to work on your behalf in this case?

A. Yes.

Q. When is your case set for trial?

A. It was set October 17, but it's been moved to April of next year.

Q. All right. Are the other lawyers on the case -- were they designed to have primary responsibility for the trial?

A. No, sir.

Q. And who have you at all times been expecting to try this case?

A. Benton Musslewhite.

Q. And if Mr. Musslewhite is under a period of suspension during this period of time, who will you get to try this case, if you know?

A. Probably Mr. Tom Pearson.

Q. Is he the lawyer you want to have try this case?

A. No, he isn't.

Q. Ms. Chaplin, I understand that you brought in here today with you a petition?

A. Yes, sir.

Q. Would you tell the Court in your own words what this petition is about?

A. This is a petition that I took to the Attorney General's Office requesting some things done about the dumpsite, and I also asked that the charges be dropped against Mr. Musslewhite and Mr. O'Quinn, and I have 1500 signatures.

Q. Okay. Where did you obtain those signatures?

A. From my neighbors, friends, people living around the dumpsite.

Q. Are those people that Mr. O'Quinn, Mr. Musslewhite have been representing in this case?

A. Most of them.

Q. So, are we talking about folks that live out there in the dumpsite that are trying to get something done about the dumpsite, that are trying to get damages as a result of the problems with the dumpsite, who want Mr. Musslewhite to stay on this case?

A. Yes, sir. These are the people that are in the lawsuit, and friends and family of the people, and neighbors.

Q. Did you collect these signatures?

A. Myself and my children and Nora Talent, who's also one of the plaintiffs in the lawuit.

MR. PINSON: We offer the petition as Defendant's 2.

***

Q. Okay. Did these other lawyers come onto this case at Mr. Musslewhite's request, or was this your design or the design of the plaintiffs in that case to bring on additonal counsel, Mr. Pearson, Mr. Meyerson, Mr. Shapiro, Mr. O'Quinn? Did they come at Mr. Musslewhite's request or your request?

A. Mr. Musslewhite's and mine.

Q. Were you introduced to these gentlemen by Mr. Musslewhite, or did you find out about these lawyers from somebody else?

A. Mr. Musslewhite and Mr. O'Quinn introduced me to the other attorneys or the attorneys, and Mr. Royceman -- I met Mr. Royceman and I went to speak with him is how I met Mr. Pearson and Mr. Meyerson.

***

REDIRECT EXAMINATION

BY MR. PINSON:

Q. With respect to the matters that counsel has just elicited from you, had you been queried in the past by Bonnie Britt of the Chronicle and Romero Garcia of the State Bar concerning these matters?

A. Yes, sir.

Q. Were they the folks that asked you not to tell your lawyer that you had talked to them?

A. Yes, sir.

Q. Did they explain why the didn't want you to talk to your own lawyer?

A. No.

***

Q. (By Mr. Pinson): At a later time, did you make an appearance before the Grievance Committee at someone's request?

A. Yes.

Q. And do you recall whether or not there were lawyers on the Grievance Committee that were asking you about the details of your case?

A. They all questioned me.

Q. Were they asking you about personal details, that is to say, the allegations and your contentions, things that you would have discussed with your lawyer?

A. It seems to me that's the way it was, yes.

Q. Do you know who those folks were? Were they with the Grievance Committee?

A. Yes. There was a Mr. Whitcalla (sic) who sat over in the corner. He was with Baker & Botts. He took notes. He didn't question me, but the rest of them did.

Q. Did Mr. Romeo Garcia, of the State Bar -- did he ever give any explanation why you shouldn't talk to your lawyer about the things you talked with him about?

A. No, but he sure got mad at me.

Q. Did he say why he was mad at you?

MR. LANDEN: Your Honor, I fail to see the relevance to the matters before the Court at this hearing.

THE COURT: Sustained.

MR. PINSON: I believe that's all we have, Your Honor.

App. CC

[Excerpt]

CHARLES BENTON MUSSLEWHITE

having been called as a witness and previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SMOOT:

Q. State your name, please.

A. Charles Benton Musslewhite.

Q. How are you employed?

A. I'm an attorney, self-employed.

Q. How long have you been a lawyer?

A. Since 1954.

Q. Where do you practice law?

A. Houston, Texas.

Q. How long have you been practicing in Houston?

A. Since 1971.

Q. And are you also known as Benton Musslewhite?

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Q. (By Mr. Smoot) Did you have any discussions with Mr. Newman and McDonald regarding newspaper advertisements?

A. Mr. Newman discussed it with me over the telephone.

Q. What was discussed?

A. Just that, I believe the way he put it, he and Mr. McDonald suggested one of the last ways of trying to, since he was going to be leaving within a week or so, to get contact with the solicitors would be through a newspaper ad.

Q. And have you seen that newspaper ad?

A. I have since I got back. You showed it to me.

Q. May I show you Petitioner's Exhibit 2, Mr. Musslewhite? Does that look like the ad?

A. That's the one you said was run and I have no way of -- I didn't see it when it was run. I've never seen it in a newspaper and I didn't get to see it before it was run. I was not in Aberdeen when it was run.

Q. What did you do about this being an ad run?

A. Mr. Newman and I talked about it. I was opposed to it at first as I think he will tell you and I was concerned about it and he assured me that it had the caveat in there that we would speak only with solicitors and not with any victims or their families and I said, "Well, Kelly, it's up to you." I don't think I have the power to tell him to do or not do anything more than he would have the power to tell me.

Q. You didn't tell him not to run it?

A. I didn't say I'm going to come up there and stop you like that. No, I did not. I did not feel I had the power to tell him not to but I made by objections. We discussed it. I said, "Do what you think is right."

Q. Did he read any of the language to you over the phone?

A. He did. I remember he read the language about where it says, "It is our policy not to take any cases except through Scottish or UK solicitors." He read that part to me, I recall, and probably some other parts. I don't think he read the whole thing to me.

Q. Then what discussions did you have with Mr. Newman and/or Mr. McDonald about sending a letter out directly to the victims or the families of the victims?

A. Well, seemed like that was the next day or day before I was leaving to go back, which I left to go back to the United States on the 21st. Maybe that was about the 20th. That's my best estimate of time. I don't know what day it actually went out. He did mention it to me and I again objected and he again said he talked with John. I believe he got on the phone and we discussed it. I said, I suggested at first, "Let's just don't mail it." Then Kelly assured me it had the statement in there that all that was asking the victim to do was to send us, to let him know the name of the solicitor or have the solicitor contact him I believe is the way he put it; and I don't believe that letter was read to me either and I agin did not feel like I had the power to say, "Kelly, do this or don't do this," but I said, "Do what you think, whatever you think is right about it." I did object.

***

KELLY LEE NEWMAN

having been called as a witness and previously duly sworn, testified as follows:

BY MR. SMOOT:

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Q. (By Mr. Smoot) Okay. You had a phone call then?

A. The phone rang. That was Ben Musslewhite calling from London and as I recall he talked to Mr. McDonald first. Mr. McDonald either read it or explained it to him over the phone. I don't recall for sure if he read it word for word or just explained it and then I got on the telephone and I had talked to Ben Musslewhite and made it clear to him that the ad said we're only dealing with solicitors and not victims and when I assured him of that, he then made a statement, "Well, Kelly, you make the decision. I'll leave it up to your discretion." He said, "I have some reservations or hesitation about it." He had some misgivings but in the final analysis he left it up to my decision.

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Further Testimony of Benton Musslewhite:

THE WITNESS: Four is the letter signed by Mr. Newman to all victims, families of victims of the Occidental Petroleum platform disaster.

Q. (By Mr. Pinson) All right, sir. Do you have any knowledge as to where that letter was disseminated to?

A. Well, Kelly told me. He discussed it with me. He told me that it was being mailed to a list of victims' names that Mr. McDonald had obtained.

Q. Did he read it to you?

A. No, he didn't read it to me. I told him as he testified that I was opposed to it. I didn't think he ought to send it under the circumstances. He assured me it had a caveat

in there that said -- we want -- the purpose of the letter was to have solicitors to contact him. I said, "Well, if you feel comfortable with that, I'll leave it up to you to decide whether or not it's appropriate to do, you and John."

Q. Was that the specific wording that you insisted on?

A. Yes, he told me that was in there.

Q. Okay. Did you review the rest of the wording on the letter?

A. I was in London. They were in Scotland. That's the conversation we had by telephone.

Q. Okay.

A. I did not see the product before it went out.

***

Q. All right. Now going to the ad that Mr. Newman took out, which was signed by him, but not the advertisement in the papers, that's number 6 -- no, I'm sorry, number 5. Who was that directed at?

A. Well, if you read it, it's certainly obviously directed to solicitors or to victims to have their solicitors contact Mr. Newman.

Q. All right. And in connection with that ad, I believe you've testified that you did not give a substantial revision to Mr. Newman's work product?

A. No. As I said, or was going to say, he talked over the telephone as we did about his letter. I objected. I said I don't think you ought to send the letter, run the ad. It's just too much hassle right now. He read

to me from both of them a statement, a caveat, a disclaimer which said we were not going to be taking cases except through Scottish or UK solicitors. I said, "Well, if that's in there you decide what you're going to do. I'll leave it up to you."

Q. Was Mr. Newman in any way being compensated for you for doing all this?

A. No. No, he's an independent lawyer. We're both independent of each other.

App. DD-1
[Excerpts from]

"Texas Lawyer"

Compulsory Membership Violates Lawyers' Rights

In a state that prides itself on rugged individualism and right-to-work laws, the existence of the State Bar of Texas as a compulsory professional organization is an anomaly.

Particularly ironic, of course, is that those who direct the Bar quite often are attorneys from large firms that represent the employers of non-organized workers and which fifht tooth and nail any semblance of union rights or due process in the work place.

Even worse, this past year has shown how State Bar officials abuse their prerogatives by squandering Bar dues to travel to luxuruous hotels, eat sumptuous meals and consume staggering amounts of liquor. In fact, this group spent more on personal amenities than a farm worker family of five can earn in two months of stooping in the hot

sun, facing dangerous pesticides. And, undoubtedly, there were some personal tax write-offs involved, but not for the farm workers.

Bar dues would have been better spent on providing pro bono legal services to improverished Texans, rather than reinforcing the negative image under which lawyers already labor.

Further, the State Bar uses membership dues to support its own ideological activities, especially in the legislative forum, which are quite often at odds with what public interest lawyers believe is appropriate for those whom they represent.

***

These are some of the reasons why 19 states have abolished the unified bar and why a Wisconsin federal court this year decided that compulsory membership violated attorneys' First Amendment rights of free speech and free association (*Levine v. Supreme Court of Wisconsin*).

The Wisconsin district court particulary focused on using bar dues for a legislative agenda, distinguishing an earlier Supreme Court ruling, which had upheld the Wisconsin unified bar 12 years earlier for other easons (*Lathrop v. Donohue*), principally for purposes of discipline and professional competence.

Even the fact that Wisconsin Supreme Court allowed attorneys to deduct that part of their dues that the bar used for its legislative purposes could not save the bar.

***

Conceptually, a State Bar should have three purposes. First, it should discipline errant attorneys (and in such a way as to inspire confidence from the public). Secondly, the Bar should provide regular, meaningful training. Third, it should set admission standards.

The last function already is handled by the Texas Supreme Court, and the other two would be better served by creating a special agency under the direction of the courts, as

other states have done.

In each area, the State Bar of Texas is currently deficient. The heavy hand of discipline rarely falls against the large firms. And, because those firms have disgraceful equal employment records, minority attorneys have to go it on their own, exposing themselves to greater mistakes that routinely would be avoided under the tutelage of a firm with many experienced lawyers.

***

James C. Harrington is legal director of the Texas Civil Liberties Union. His commentaries, which appear regularly in Texas Lawyer, *are personal views and do not necessarily reflect the position of the TCLU.*

EXHIBIT DD-2
[Excerpts From]

"Texas Lawyer"

January 2, 1989 - Vol. 4, No. 39

Ruling Invites Scrutiny of How Firms Hustle Corporate Clients

By Richard Connelly And Diane Burch

Now that John O'Quinn's high-profile constitutional challenge to the State Bar rules has been forcefully rejected by the Texas Supreme Court, his disciplinary suit may turn into a nasty, prolonged and eye-opening look at how prominent Texas firms and attorneys do business.

The 7-1 ruling, issued Dec. 14, found no basis for O'Quinn's arguments that Bar rules banning solicitation of accident victims by so-called "runners" were overbroad and a violation of commercial free speech guarantees.

***

O'Quinn's attorneys were not completely unhappy with the rebuff, however, citing a section in the majority opinion by Justice

William Kilgarlin that hinted the justices thought the Bar might be engaging in selective prosecution of O'Quinn, a prominent Houston trial lawyer accused of hiring runners.

In language that drew pointed criticism in two concurring opinions, Kilgarlin wrote for the majority that the ardent wooing of corporate clients is not disciplined by the Bar despite it being the equivalent of soliciting accident victims.

"One need only read the occasional stories in newspaper business sections to be aware that sophisticated solicitation by law firms of corporate clients occurs more than infrequently," Kilgarlin wrote. "What one will not read in newspapers, but what allegedly exists, is monetary kickbacks to insurance claim managers or fee cutting in bidding wars to obtain corporate clients .... [K]ickbacks and bidding wars are just as demeaning to the legal profession as unseemly solicitation of personal injury clients, even when no client, corporate or personal injury,

complains."

O'Quinn's attorneys say that the court's opinion gave direction to 189th District Judge Richard Millard, who will hear the disciplinary suit, when Kilgarlin wrote: "Without a development of facts by the trial court, however, this court cannot pass upon the question of whether the disciplinary rules are constitutionally infirm because of the apparent inequality in their enforcement."

"Now that is what the case is about and the Supreme Court has given the trial court that guidance, and us as well, so now we know how to proceed with the case," said Luther Soules III, name partner in San Antonio's Soules & Wallace and a member of O'Quinn's high-powered defense team. "The opinion would have been extremely misleading without that sentence in there."

Although Soules said a gag order limited him to general comments on the opinion, filings in the suit indicate the strategy O'Quinn's team is likely to take. The defense

has filed notice it intends to take at least 115 depositions, including those of all current and former directors of the State Bar who have served since the suit was filed in 1986, and all members of the local grievance committee that heard the original grievance.

The deposition notices, along with the filing of a lengthy compilation of news articles dealing with wining and dining of potential corporate clients, indicate that O'Quinn's attorneys will be asking the directors "how they get their business," as one attorney familiar with the case said. In-person contacts not prosecuted as solicitation apparently would be noted in arguments about selective enforcement.

The court's stated interest in corporate solicitation opens the subject as a legitimate area for discovery and makes it more difficult for the Bar to argue, as expected, that the case should be limited to proving the specific allegations against O'Quinn, said the attorney, who asked that he not be identified.

***

Neither side would comment on the potential for an out-of-court settlement. Court documents filed before a March 17 stay of all lower-court proceedings indicate that O'Quinn was ready to accept a public reprimand. O'Quinn's Feb. 19 reply to the Bar's motion for summary judgment says "a meeting of the minds clearly existed" between O'Quinn and the Bar over a settlement.

Court documents indicate O'Quinn offered to settle for a public reprimand and 18 months of cooperation with Bar authorities, to include his testifying in cases against solo practitioners Benton Musslewhite, accused of solicitation, and Newton Schwartz, accused of mishandling clients' funds. The Bar, for its part, would assist in getting O'Quinn immunity from any federal or state prosecution.

APP. EE
(Excerpts)

NO. 14-89-00041-CV

*

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT
AT HOUSTON, TEXAS

*

BENTON MUSSLEWHITE,
Appellant,

versus

THE STATE BAR OF TEXAS,
Appellee.

*

Appeal from the 270th Judicial
District Court of Harris County, Texas
- No. 86-44452 and 87-24402

*

APPELLANT'S BRIEF

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POINTS OF ERROR

I.

POINTS OF ERROR CONCERNING PIPER ALPHA ALLEGATIONS

POINT OF ERROR ONE

The District Court erred in failing to construe DR 2-101 in such a manner as to make it inapplicable to the communications in the press release, the advertisement and letter to victims, because such communications were ultimately directed solely to U.K. Solicitors (lawyers) and not to victims and the State Bar utterly failed to show that the Solicitors were incapable of making a reasonable verification of any statements contained in such communications. (See, Pre-Judgment Motion for Rehearing, Supp. TR and TR 65, par. C, 1(c); TR 67, par. 4; TR 75, par. B; TR 77, par. G(i); TR 67, 83, 84; TR 104, 105, par. B; TR 108, par. E, F 109; TR 112, 113, pars J and K; TR 128 to 130, par. (iv), (v), (vi), (vii), (viii); Supp. Tr., Appellants Requested Findings of Fact and Conclusions of Law; TR 27-29, 32-35 of Appellant's Orig. Ans.; SF 19, 20, 25, 26,

31-34, 38-39, 50, 58, 60, 65, 68, 76-78, 119, 120, 189, 195, 203-205, 244, 247, 250, 255-259, 264, 265, 327, 404, 409, 410).

POINT OF ERROR TWO

Because of the manner in which the State Bar is attempting to construe and apply DR 2-101, the Court below erred in failing to hold that such Disciplinary Rule is unconstitutional because it is unreasonably vague and a reasonable attorney, such as Appellant, would have no way of realizing that the State Bar would attempt to apply it to communications from Appellant to other attorneys, such as the U.K. Solicitors. (See Pre-Judgment Motion for Reconsideration, Supp. TR; see TR pages cited under Point One above and TR 60; TR 65, par. (c); TR 68, par. 4; TR 75, par. B; TR 77, par. G(i); TR 79-82; TR 82-84; TR 104-105, 108-113, 127-131, 133, 140 Orig. Ans., TR 27-29, 32-35; and Motion for Continuance and Request for F.O.F. and C.O.L. in Supp. TR).

POINT OF ERROR THREE

If the Court below correctly construed DR

2-101, then the Court below erred in failing to hold that DR 2-101 is unconstitutional as written and/or as applied, in violation of the First Amendment to the Constitution of the United States and Article 1, Section 8 of the Constitution of the State of Texas, because:

a. All such communications (in the press release, advertisement and letter to victims) were ultimately directed solely to U.K. Solicitors and not to victims.

b. Such U.K. Solicitors were not shown by the State Bar to be incapable of reasonably verifying the statements contained in the communications in question.

c. The intended audience of such communications (U.K. Solicitors) were, as a matter of law, sufficiently "sophisticated" to reasonably verify the statements contained in such communications.

d. The State Bar did not establish that it had any proper and substantial governmental and/or police power interest in regulating public communications from one

lawyer to another.

e. All such communications were true on their face and the State Bar did not prove that there was any history demonstrating that such types of communications from one lawyer to other lawyers were likely, from a historical point of view, to render non-lawyers susceptible to fraud, duress and/or overreaching.

f. Even if the State Bar had shown (which it did not) that there was a substantial governmental interest in regulating communications from one lawyer to other lawyers, the State Bar failed to prove that the regulation of such communications would directly advance such governmental interest, if any.

g. The State Bar failed to prove that the attempted regulation of communications from one lawyer to other lawyers was not more extensive than was necessary to further any alleged governmental interest.

h. In any event, on the basis of the Record before this Court, it was undisputed

that such communications were not false and misleading. (See TR 113-127; as to all of the above, see references under Points One and Two and especially see TR 129, 139).

POINT OF ERROR FOUR

The District Court erred in entering the Judgment Revoking Probation on the basis of the Piper Alpha allegations because the Findings of Fact made by the Court below (Findings Nos. 4-42, TR 166-172; Nos. 34-113, TR 182-192) are not sufficient to support the Judgment Revoking Probation, even if such Findings of Fact were supported by evidence (which they are not). (See Appellant's Requested F.O.F. and C.O.L. in Supp. TR; Pre-Judgment Motion for Rehearing in Supp. TR; Motion for New Trial, TR 104-105, 108-131; and all the SF references under Point One above and under Points Six, Seven and Eight below).

POINT OF ERROR FIVE

The District Court erred in entering the Judgment Revoking Probation based upon the Piper Alpha allegations because the material

Findings of Fact with respect to the Piper Alpha episode and the alleged violations of DR 2-101, the advertising rule (See Findings Nos. 4-42, TR 166-172 and Nos. 34-113, TR 182-192), are:

a. Not supported by any evidence.

b. Not supported by sufficient evidence.

c. Such findings are against the great weight and preponderance of the evidence.

d. Not supported by the pleadings.

(See, Appellant's requested F.O.F. and C.O.L. in Supp. TR; Pre-Judgment Motion for Reh. in Supp. TR; Motion for New Trial, TR 104-105, 108-131; and SF references under Points Six, Seven and Eight Below).

POINT OF ERROR SIX

The District Court erred in granting the Judgment Revoking Probation on the basis of the communications contained in the press release because:

a. For all the reasons stated under Points One through Five above.

b. Even though it was undisputed that the press release was handed out to the few

reporters who were present at the press conference, there was no evidence that the statements in the press release were ever printed in a newspaper or broadcast on an electronic media or any other media described in DR 2-101. (See TR 111, 112, 127, 128).

c. It was undisputed that the statements contained in such press release were not false and misleading. (SF 30-37, 52, 53, 126, 127, 131, 133, 137, 187-190, 192, 193, 201, 202, 205, 206, 238-242, 252, 255, 273-281, 315-326, 330-340; also all the references under Points Four and Five above and TR 82-84, 104-105, 108-131; the Requested F.O.F. and C.O.L. in Supp. TR; and SF 25-39, 67, 68, 249, 250, 256-259, 268, 269, 287, 288).

POINT OF ERROR SEVEN

The District Court erred in entering the Judgment Revoking Probation on the basis of the communications contained in the advertisement in question, because:

a. For all the reasons stated under Points One through Five above (and see references below).

b. There was no evidence that Kelly Newman was acting as the agent of Appellant or in such a way so as to render Appellant responsible for the advertisement in question - in fact, it is undisputed that Kelly Newman was not acting as the agent of the Appellant when the advertisement was run. (In addition to the cites below, see also SF 15-18, 48-51, 57-65, 76-76, 117, 118, 198, 199, 278, 286).

c. It is undisputed that the statements contained in the advertisement are true and correct. (See SF references under Point Six (c) above; see also all the references under Points Four, Five, and Six above and see SF 49, 53, 64-70, 268, 284, 285 and re no agency, SF 15-18, 48-51, 57-65, 75-76, 117, 118, 198, 199, 276-278, 286).

POINT OF ERROR EIGHT

The District Court erred in rendering the Judgment Revoking Probation on the basis of the communications contained in the letter to victims sent by Kelly Newman because:

a. For all the reasons stated in Points One through Five above. (See references

below).

b. The State Bar did not offer any evidence to show that the statements contained in the letters were ever placed in the public domain, that is published in a newspaper, broadcast over TV or radio or other public media as is defined in DR 2-101. (See references below).

c. The State Bar offered no evidence to establish that Kelly Newman was acting as the agent of the Appellant when the letter to victims was sent - in fact it was undisputed that he was not acting as his agent or in such a manner as to make Appellant responsible for the sending of such letter (See SF references under Point Seven b. above and see TR 109-111, 128 especially).

d. The doctrine enunciated by the United States Supreme Court in the recent case of Shapero v. Kentucky Bar Assn., 100 L.Ed.2d 475 (1988), expressly authorizes a letter such as the one written by Kelly Newman. (See references below).

e. All statements contained in the

letter are true and correct. (See SF references under Point Six (c); see also references under Ponts Four, Five and Six above and SF 50, 51, 70-72, 75, 77, 135, Deft. Exh. 13, 409, 264, 265, 268, 279).

POINT OF ERROR NINE

The District Court erred in rendering the Judgment Revoking Probation on the ground that the Appellant did not disclose in the communications complained-of that he was under probation and the terms of such probation, because the moment such disclosure became relevant - such as when any Solicitor approached Appellant about potential employment - it is undisputed that Appellant made full and complete disclosure about the probation and the terms of such probation. (See SF 14, 16, 17 23, 34, 42-44, 62, 63, 73, 74, 121-125, 240, 241, 259, 260, 271-276, 322; Appellant's requested F.O.F. and C.O.L. in Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR and references to TR under Points One-Five above).

POINT OF ERROR TEN

The Distict Court erred in not granting Appellant's Motion to Abate Proceedings with respect to the Piper Alpha allegations, and in proceeding with the revocation trial even though such allegations had not been processed through the grievance committee and the Appellant given a right of trial by jury in the district court, all as guaranteed him and all lawyers of the State of Texas by Sections 10-24 of Article X of the State Bar Rules, and the District Court's failure to do so constituted:

a. A violation of Sections 10-24 and other sections of the State Bar Rules.

b. A violation of the due process rights of the Appellant under the Fourteenth Amendment of the Constitution of the United States and Article 1, Section 19 of the Constitution of the State of Texas, as well as the Open Courts provision of the State of Texas, Article 1, Section 13, of the Constitution of the State of Texas. (See Appellant's requested F.O.F. and C.O.L. of Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Orig. Answer, Plea in Abatement, TR 23-26; Motion for New Trial, TR 60, 65, 74, 105-107, 133; and Motion for Injunction, TR 149, 150).

POINT OF ERROR ELEVEN

Aside from the fact that all the communications complained-of are true and not false and misleading, such communications did not violate DR 2-101 (A)(1), DR 2-101 (a)(4) and the other provisions of DR 2-101, because:

a. They were not "material" representations, particularly in view of the fact that they were directed to U.K. Solicitors who could make reasonable verification of same.

b. None of the statements were made in the public media with the consent of Appellant or by a person acting as his agent.

c. The intended audience of such statements, namely U.K. Solicitors, were sophisticated enough to make reasonable verification of the statements therein made and, therefore, under no circumstances could they constitute proper violations of any advertising rules such as DR 2-101 (See references under Points One-Five above).

II.

POINTS OF ERROR PERTAINING TO THE REFERRAL CLAUSE

POINT OF ERROR TWELVE

The District Court erred in entering the Judgment Revoking Probation on the basis of the Referral Clause because it is undisputed that the Hartmans were not new clients of the Appellant inasmuch as they were already his constructive clients prior to November 1, 1987, the commencment of the one year that the Referral Clause was in effect. (See Original Answer, TR 30, 31; Appellants' Request for F.O.F. and C.O.L. in Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Motion for New Trial, TR 89, 90; Pltf Exh. 10; SF 234, 290, 291).

POINT OF ERROR THIRTEEN

The District Court erred in entering the Judgment Revoking Probation on the basis of the Hartman case because, utilizing appropriate rules of construction (particu-

larly those pertaining to custom and usage, the penal nature and effect of the Referral Clause, construing same to be constitutional and reasonable, construing same against the scrivener and construing same so that it will be legally valid), it is clear that the District Court erred in failing to construe the Referral Clause in such a way that it was consistent with the manner in which Appellant actually referred the Hartman case to Wayne Mansulla. [Orig. Answer, TR 31, 32; Supp. Answer TR 37, 38; Appellant's Requested F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rhearing, Supp. TR; Motion for New Trial, TR 64-65, 82, 86-89, especially 90-103; SF 441-444, 234, 235, 323, 355, 338, 359, 372, 297, 380-386, 388, 397, 398, 169, 173-176, 297-301, 304-309, 213-216, 218, 219, 354, 360, 369, 373=375, 313, 314, 335, 336, 373-375).

POINT OF ERROR FOURTEEN

The District Court erred in rendering the Judgment Revoking Probation on the basis of the Hartman case because the Referral Clause

is unconstitutional under the Vagueness Doctrine and, therefore, Appellant's rights under the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 19 of the Texas Constitution were violated. (Orig. Ans. TR 31, 32; Appellant's Request for F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Supp. Answer, TR 37-38; Motion for New Trial, TR 64, 65, 77, 82, especially 85-89, 90-103, 132-135; Request for Injunction, TR 149-151 especially; and see all cites to SF under Point Thirteen above).

POINT OF ERROR FIFTEEN

The District Court erred in granting the Judgment Revoking Probation on the basis of the Hartman case because, if the State Bar is correct in its interpretation of the Referral Clause, said clause is void because it is in fatal conflict with DR 2-107 (the State Bar has taken the amazing position that a lawyer can receive a referral fee without being "employed" as an attorney and this interpretation directly conflicts with DR

2-107 which requires a lawyer to be "employed" in order to receive a referral fee). (Supp. Answer, TR 37, 38; Appellant's Requested F.O.F. and C.O.L., Supp. TR; Pre-Judgment Request for Rehearing, Supp. TR; Motio for New Trial, TR 60, 61, 86-88, especially 90, 91, 99, 100; Motion for Injunction, TR 150, 151; SF 355-358, 363, 365-369, 376, 379).

POINT OF ERROR SIXTEEN

The District Court erred in rendering the Judgment Revoking Probation on the basis of the Referral Clause because such clause is void and of no effect in view of the fact that it constitutes the imposition of a form of punishment not permitted under Sec. 23(A) of Art X of the State Bar Rules (a sanction which says Appellant can take no new cases for one year unless he refers them out is not a punishment listed in the State Bar Rules and any judgment imposing a non-listed sanction is void to that extent). (Supp. Answer, TR 38; Appellant's Requested F.O.F. and C.O.L., Supp. TR; Pre-Judgment Request

for Rehearing, Supp. TR; Motion for New Trial, TR 67, 68, 85, 86; Motion for Injunction, TR 150, 151; SF 344, 345, 351, 352).

POINT OF ERROR SEVENTEEN

The District Court erred in granting the Judgment Revoking Probation on the basis of the Referral Clause because such Clause resulted from an agreement between Appellant and the State Bar and, since it restricted Appellant's law practice, it violates DR 2-108 and is therefore void. (Supp. Answer, TR 38; Appellant's Requested F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Motion for New Trial, TR 67, 85; Motion for Injunction, TR 150, 151; SF 421, 422, 423).

POINT OF ERROR EIGHTEEN

The District Court erred in granting the Judgment Revoking Probation on the basis of the Referral Clause because it is undisputed that Appellant did indeed refer the Hartman case to one Wayne Mansulla in a manner consistent with the Referral Clause. (Orig.

Answer, TR 31, 32; Appellant's Request for F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Motio for New Trial, TR 87, 88, 90-99, 99-100; especially see SF cites under Points Twelve and Thirteen above; Pltfs Exh 11; and SF 54, 55, 145, 146, 288, 289, 292-296).

POINT OF ERROR NINETEEN

The District Court erred in granting the Judgment Revoking Probation on the basis of the Referral Clause because the Appellee was estopped from asserting such matter as a ground for revocation since the Custodian appointed by the Court had been advised by Appellant of the Hartman referral and the facts surrounding same; said Custodian had advised Appellant that he had "no problem" with the manner in which Appellant was referring the Hartman case to Mansulla; and Appellant relied upon the acquiescence of the Custodian, to Appellant's detriment. (See Request for F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Motion for New Trial, TR 100, 101; SF 232,

233, 234, 282-284).

POINT OF ERROR TWENTY

The District Court erred in granting the Judgment Revoking Probation based upon the Referral Clause because the material Findngs of Fact with respect to said Clause (See Findings Nos. 43-48, TR. 172, 173 and Findings Nos. 1-32, TR. 176-182):

a. Even if correct (which they are not), do not support a judgment of revocation on the basis thereof.

b. Are not supported by any evidence.

c. Are not supported by sufficient evidence.

d. Are against the great weight and preponderance of the evidence.

e. Are not supported by the pleadings. (See Orig. Answer, TR 31, 32; Appellant's Requested F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Motion for New Trial, TR 103; SF cites under Points Twelve, Thirteen, Fifteen, Sixteen, Seventeen, Eighteen and Nineteen above).

III.

VIOLATION OF NOTICE RULES AND ABSENCE OF PROCEDURAL DUE PROCESS

POINT OF ERROR TWENTY-ONE

The District Court erred in overruling Appellant's Motion for Continuance; in proceeding with the revocation hearing in the face of the fact that Appellant had only five days notice of the Revocation trial; and in entering the Judgment Revoking Probation on the basis of such trial because:

a. The Court violated Rule 99, T.R.C.P., which requires that the party defendant in a new proceeding be given until the first Monday after the expiration of twenty days (after service of process) in which to appear and respond.

b. The Court violated Rule 245, T.R.C.P., which requires at least ten days notice before setting a contested case for trial (after the defendant has appeared).

c. Under Texas law the action of the Court proceeding without the requisite notice to Appellant rendered the proceedings, and

the judgment rendered thereon, void and of no effect.

d. The Court abused its discretion in overruling the Motion for Continuance.

e. The Court erred in failing to grant Appellants special exceptions complaining of the failure of Appellee to allege the specific disciplinary rules on which it relied in its efforts to revoke Appellant's probation.

f. The action of the Court in proceeding with the Revocation trial with only five days notice to the Appellant and at a time when Appellant had no counsel; without forcing the Appellee to specifically allege the disciplinary rules on which it relied; and without giving Appellant time to complete important discovery, violated Appellant's due process rights under the Fourteenth Amendment to the United States Constitution and Article 1, Sect. 19 of the Texas Constitution. (See Motion for Continuance, Supp. TR; Orig. Ans., TR 26, 27; Motion for New Trial, TR 62, 63; Request for Injunction, TR 15 of Appellant's

Request for F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR).

IV

FAILURE TO GRANT SUPERSEDEAS

POINT OF ERROR TWENTY-TWO

The District Court erred in failing to grant the Appellant a stay of the suspension and/or a supersedeas pursuant to the terms and provisions of Rule 47, T.R.A.P., for the following reasons:

a. The District Court should have construed Section 24 of Article X of the State Bar Rules in *pari materia* with Sections 22 and 26 of Article X of the State Bar Rules, so as to conclude that any attorney against whom a judgment of suspenson has been rendered has a right to supersede that judgment of suspension in accordance with Rule 47 of the T.R.A.P., unless such attorney has been convicted of a felony or crime of moral turpitude in accordance with Sec. 26 and/or has been shown to be "an immediate and irreparable threat of harm to his clients and

potential clients", in accordance with Section 22.

b. If the Court below is correct in the manner in which it construed Section 24 of Article X of the State Bar Rules, then Section 24 is thereby rendered unconstitutional as written and/or as applied, because it violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, as well as Article 1, Sections 13 and 19 of the Texas Constitution.

c. Also, the District Court failed to provide procedural due process to the Appellant with reghard to a supersedeas because it refused to conduct and hold a hearing on the question of whether or not the Appellant was entitled to supersedeas before it summarily suspended Appellant pending appeal and, therefore, Appellant did not have a fair opportunity to establish his right to supersedeas pursuant to Rule 47, T.R.A.P. (See Request for F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR;

Motion for New Trial, TR 55-62, 140; Motion for Injunction, TR 149, 153, 158-160; SF 464-471, 169-173, 177-178, Vol. IV, p. 31, 12, 91, 92, 108-117).

V.

EXCESSIVE PUNISHMENT

POINT OF ERROR TWENTY-THREE

The District Court abused its discretion in assessing punishment of three years suspension; moreover, assessment of such punishment under the circumstances of this case is unconstitutional under the Eighth and Fourteen Amendments to the United States Constitution and Article 1, Section 19 of the Texas Constitution; this cause should be reversed and remanded and this Court should reduce the punishment, if any, to what is proper under all the circumstances of this case. (See Pre-Judgment Motion for Rhearing, Supp. TR; Motion for New Trial, TR 77-82, 131 especially; SF 281-284, 10, 11, 210-212, Vol. IV, 9, 13-26, 28-33, 38-49, 51-65, 99-110).

App. EE
[Excerpts]

STATEMENT OF THE CASE

This case involves an appeal from a judgment of suspension of the Appellant attorney ("Judgment Revoking Probation"). The Appellant had entered into a disciplinary settlement with the Appellee in January of 1988 ("Agreed Judgment"). The Agreed Judgment provided for a three-year probation of Appellant. In September of 1988, the Appellee filed a suit to revoke the probation and, on November 21, 1988, the Court below revoked Appellant's probation and entered the judgment suspending Appellant for a period of three years. Appellant has perfected a timely appeal from the Judgment Revoking Probation.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

The proceeding below is a shocking collage of unconstitutional abrogations. As an attorney, Appellant had no special rights over other citizens to constitutional protections but he certainly was entitled to

no less rights. Due process, and Appellant, were crucified on the cross of some indefinable goal[1] which was personified by excessive zeal and an abuse of power. The proceedings made the basis of this appeal were commenced in total disregard of the "first Monday after the expiration of twenty days" requirement of Rule 99, T.R.C.P.; the ten-day notice requirement in Rule 245, T.R.C.P.; and just plain fundamental procedural due process as defined in the landmark case of Roller v. Holly, 176 U.S. 398 (1899).[2]

The primary thrust of the suit to revoke centered upon three communications (a press release, an advertisement and a letter), all relating to the Piper Alpha disaster which were, on their face, ultimately directed only to Solicitors and lawyers and not to victims or the general public.[3] Yet, without blinking an eye, the Court below - at the urging of the State Bar and in clear derogation of the First Amendment of the U.S. Constitution as articulated in Bates v. State Bar of Arizona,

433 U.S. 350, 53 L.Ed. 2d 810 (1977), (hereafter "Bates"); Zauderer v. Office of Disciplinary Counsel of Ohio, 471 U.S. 626, 85 L.Ed.2d 652 (1985), (hereafter "Zauderer"); Re R.M.J., 455 U.S. 199, 71 L.Ed.2d 64 (1982), (hereafter "R.M.J."); Shapero v. Kentucky Bar Assn., 100 L.Ed.2d 475 (1988), (hereafter "Shapero") and Article 1, Sect. 8 of the Texas Constitution - suspended the Appellant's license to practice law for three long years on the basis of those three pieces of communicatons. Moreover, Appellant's constitutional right to have the Piper Alpha allegations processed through the grievance committee procedures, with eventual right to trial by jury, was denied by the Court below, in violation of Sections 10-24, Art. X of the State Bar Rules and the principles enunciated by the Supreme Court of the United States in the celebrated case of Logan v. Zummerman Brush Co., 455 U.S. 422, 71 L.Ed.2d 265 (1982) (hereafter "Logan v. Zimmerman"). Furthermore, DR 2-101, as construed by the Court below, was rendered

unconstitutional under the Vagueness Doctrine.

The second, and only other, ground asserted by the State Bar as a basis for revocation, was that Appellant violated a provision in the Agreed Judgment which allowed him to take new cases during the first year of probation only if Appellant referred such cases to other lawyers (the "Referral Clause"). The State Bar took the bizarre position that Appellant violated the Referral Clause because he became "employed" as an attorney before he referred the case in question to another lawyer, even though the State Bar conceded that Appellant could receive referral fees out of all referrals made during that year. Despite the fact that the State Bar's position clearly contravened DR 2-107, which requires a referral lawyer to be "employed" as an attorney, and further violated the Appellant's due process rights under the Vagueness Doctrine, the Court below also based the three-year suspension on the alleged violation of the Referral Clause.

In addition, the imposition of three years' suspension, based solely upon alleged hypertechnical violations of the advertising rule (DR 2-101) and the Referral Clause in the Agreed Judgment, may very well have violated the Eighth Amendment's (and Art. 1, Sect 13, of the Texas Constitution) prohibition against excessive fines and punishments, as well as Appellant's due process rights.

And last, but certainly not least, the Court below - without any police power basis for doing so - refused to allow Appellant to supersede, pending appeal, the three year suspension. Such refusal constitutes another cumulative violation of Appellant's constitutional rights. Thus, the State Bar has gotten its pound of flesh even though it had to repeatedly ignore the Constitutions of the State of Texas and the United States in order do so.

What this appeal is really all about though, is the right of free speech as guaranteed by the First Amendment to the

United States Constitution and Article 1, Sect. 8 of the Texas Constitution. As General George Washington warned the officers of the Continental Army in the cold winter of 1783, "the freedom of speech may be taken away, and dumb and silent we may be led, like sheep to the slaughter." The undisputed evidence in this case established that a number of competent Scottish Solicitors were genuinely concerned that a small group of Solicitors in Aberdeen, working with another group of American lawyers, were attempting to forge a group settlement of the Piper Alpha claims for grossly inadequate amounts (120,000 pounds per family). Appellant's press conference, according to some of the Scottish Solicitors, helped thwart that effort. Appellant's method - having a press conference concerning potential jurisdiction in Texas - may not be a method of which many members of the Court would personally approve, but, as Justice Oliver Wendell Holmes admonished us, the greatest constitutional imperative is that we must

protect the freedom of others to express the thought and speech "that we hate". U.S. v. Schwimmer, 279 U.S. 644, 653 (1928).

Appellant's press conference constituted his freedom of expression of how to best deal with the situation at hand. It was a method that Appellant had used before, e.g. the Ocean Ranger tragedy. And it was this method - of directing all public statements about potential litigation in the U.S. only to the Solicitors and lawyers in the area, with the caveat that Appellant would not accept any cases except through such Solicitors and lawyers - that was clearly protected by both the Constitutions of the United States and the State of Texas.

What is really at the bottom of this inquisitorial prosecution is not any perceived violation of DR 2-101 - the General Counsel's Office knows full well that what Benton Musslewhite did in Scotland was constitutionally protected. What they are really after is the unorthodox, the outspoken, the non-conformist, the activist,

the crusader, the unpopular, the politically liberal, the aggressive lawyer - the lawyer who really does seek to implement the mandate of EC 8-3 to educate members of the public "to recognize the existence of legal problems" and to provide "methods for the intelligent selection of counsel".[4] And what could be a better method of fulfilling Appellant's responsibility under EC 8-3 than that employed by Appellant in the Piper Alpha situation - a public urging that victims hire their own Solicitor, known to them, and have that Solicitor verify statements of American lawyers about potential American jurisdiction, comparative amounts of recovery, qualifications, contingent fees to be charged, and the like.

But the General Counsels' Office does not like that method. So, with a "casual indifference to the gravity of (the) injury inflicted upon an attorney, "Zauderer, 85 L.Ed.2d at 684, the General Counsel's Office and the Court below proceeded, "under the guise of prohibiting professional misconduct

(to) ignore constitutional rights." See NAACP v. Button, 371 U.S. 415, 439, 9 L.Ed.2d 405 (1963).

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However, one thing is crystal clear - if this Court does not agree with us about the proper construction of the Rules and Judgment, then it muist declare them unconstitutional as applied and/or as written. To be sure, the cumulative effect of the various desecrations of Appellant's constitutional rights in this case makes a mockery of the Due Process Clause and the First Amendment.

AMENDED POINT TWENTY-THREE AS CONTAINED IN SUPPLEMENTAL BRIEF OF PETITIONER FILED IN STATE COURT OF APPEALS

The District Court erred in failing to dismiss the petition to revoke and/or to deny revocation of probation because - leading up to and commencing with the prosectuion of Appellant in the underlying disciplinary action, to and through those revocaton proceedings - Appellant has been the victim of unconstitutional violations of the Due

Process and Equal Prtection Clauses of the U.S. and Texas Constitutions, including unconstitutional selective prosection, impermissible persecution based upon Appellants use of press conferences and rights of free speech, deprivation of rights to which he was entitled by state law and the U.S. and Texas Constitutions, unconstitutionally excessive punishment and other forms of violation of the Equal Protection Clause, and because the State Bar failed to meet the burden of persuasion and/or going forward with the evidence which had shifted to it, to prove that its prosecution of Appellant, and not others, or others with far less zeal, who were similarly situation, was rationally related to some legitimate state purpose and did not constitute invidious discrimination. (See pleadings; Motion for Injunction, Motion for Change of Venue, Motion for Continuance and Motion for New Trial, Orig. TR 17-82, re pretrial publicity; Orig. TR 149-158, re new violations, absence of trial by jury,

financial arrangements, Equal Protection generally, conduct of Custodian, etc; Orig. TR 160-165, re specific allegations of selective prosecution and enforcement; Orig. TR 189-190, re Equal Protection; Orig. TR 183, 187, 191-194, re free speech; 1st Sup. TR, 14, 15, 18, 22, 23, 32, re "selective enforcement", 34, 35, free speech, 73, 74, 124 and 126, re Equal Protection and Due Proces generally).